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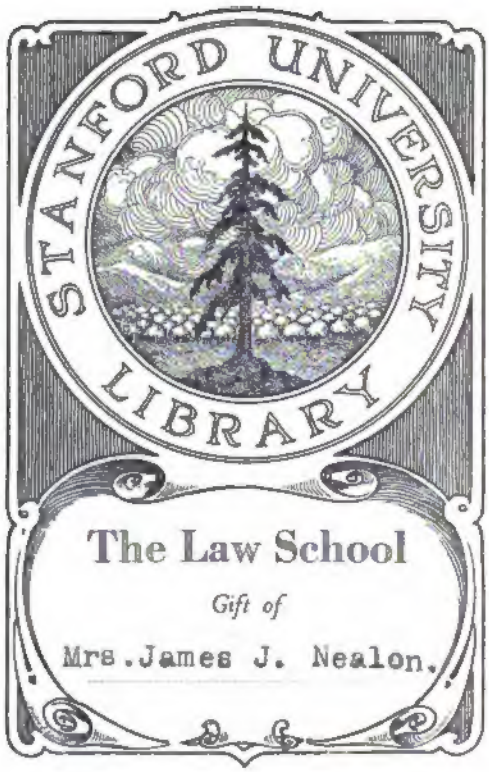
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HANDBOOK

OF THE

LAW OF CONTRACTS

BY WM. L. CLARK, JR.

AUTHOR OF CLARK'S HANDBOOK OF CRIMINAL LAW,
CLARK'S HANDBOOK OF CORPORATIONS, ETC., ETC.

THIRD EDITION

BY ARCHIBALD H. THROCKMORTON

PROFESSOR OF LAW, INDIANA UNIVERSITY

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1914

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(CLARK CONT.3D ED.)

PREFACE TO THE THIRD EDITION

THE object of the editor in preparing this edition of Mr. Clark's work has been to make a careful revision of both text and notes. In the text, a few changes have been made, as, for example, in the passages treating of offers under seal, consideration, and releases. Numerous additions have also been made, the most important of which have been for the purpose of a more adequate treatment of subjects of recent development, such as contracts in restraint of trade or tending to the establishment of monopoly. The notes have been expanded, and have been increased in number to the extent of about twenty per cent. In all, about one thousand new cases have been cited. These consist principally of cases decided since the publication of the second edition, and have been selected, not for their cumulative effect, but because they support new text, or contain statements of new principles or valuable discussions of old ones. Cases the names of which are printed in bold type are those found in Throckmorton's Cases on Contracts, which was prepared especially for use with this work. Appended to the notes are citations to the sections of the Century Digest and the Decennial Digest (Key-No.), where may be found exhaustive collections of cases in point. The chapter on Agency has been omitted, as that topic is now the subject of a separate course in practically all law schools. It has been thought wise, however, to retain the chapter on Quasi Contracts, principally for the benefit of the large number of schools which, as yet, have no separate course in that subject.

BLOOMINGTON, IND., January 24, 1914.

A. H. T.

PREFACE TO THE SECOND EDITION

IN PREPARING the present edition the editor has had the benefit of suggestions made by many instructors who have used Mr. Clark's book in the classroom. Some new matter has been added, which has led to the condensation of portions of the original text; and some cases formerly cited have been omitted to make room for more recent cases, but the editor has endeavored to retain all

leading cases cited by Mr. Clark. The chapters on Agency and Quasi Contracts, although perhaps somewhat beyond the scope of an elementary book on Contracts, have been retained with little change, for the benefit of schools which do not make these topics the subjects of separate courses.

The publishers have adopted the device of printing in bold type the names of cases cited in the notes which are found in certain of the collections of leading cases. The cases so printed are to be found in Hopkins' Cases on Contracts, Langdell & Williston's Cases on Contracts, Williston's Cases on Contracts, Huffcut & Woodruff's American Cases on Contracts, Keener's Cases on Contracts, and Keener's Cases on Quasi Contracts.

ST. PAUL, June 3, 1904. FRANCIS B. TIFFANY.

PREFACE TO THE FIRST EDITION

IN PREPARING this work the object has been to present the general principles of the law of contract clearly and concisely, with proper explanations and illustrations,—not to make a digest. There has been no attempt to be original for the mere sake of originality. Statements of rules have been freely taken from recognized authorities. So much use has been made of Sir William Anson's and Mr. Leake's works, that acknowledgment has not always been made in the notes. A general acknowledgment is therefore made here. Where matter has been obtained from other sources it has been duly acknowledged.

Nearly 10,000 cases have been cited. Every one of them has been personally examined, and is cited because in point,—not because it has been cited by some other writer, or in some other case, or because it is found in the digests. A few cases have been cited for their valuable dicta, or because they collect and discuss the cases, but in most instances the cited case will be found to embody an actual decision directly in point. Where a number of decisions have been cited to the same point, the leading cases and those best illustrative of the principle involved have been cited first.

ST. PAUL, MINN., November 15, 1894. W. L. C., Jr.

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This volume contains Key-Number Annotations

That is to say, for every point of law which is stated or discussed in the text, and in support of which cases are cited, there is added to the author's note a citation to the Key-Number section or sections in the Decennial Digest or in the Key-Number Series, under which all cases directly involving that point have been digested. A similar citation to the Century Digest is given, except where the principle involved is one on which no case law existed prior to 1897.

P.M.

HANDBOOK

OF THE

LAW OF CONTRACTS

THIRD EDITION

CHAPTER I

DEFINITION, NATURE, AND REQUISITES OF CONTRACT IN GENERAL

1–2. Contract Defined.
3. Agreement.
4. Obligation.
5. Concurrence of Agreement and Obligation.
6. Promise.
7–9. "Void," "Voidable," and "Unenforceable" Agreements.
10. Essentials of Contract.

CONTRACT DEFINED—BROADEST SENSE

1. A contract, in its broadest sense, is an agreement whereby one or more of the parties acquire a right, in rem or in personam, in relation to some person, thing, act, or forbearance. It may be, in its inception:

(a) Executory; that is, where an obligation is assumed by one or both parties to do or to forbear from doing some act. The rights acquired are rights in personam.

(b) Executed; that is, where everything is done at the time of agreement, and no obligation is assumed, as in the case of a conveyance of land without covenants, or a sale and immediate delivery of goods for cash and without warranty.[1] Executory contracts when fully performed are also said to be executed.

[1] The propriety of calling such an agreement a contract has been questioned. Post, p. 8, note 19.

SAME—PROPER SENSE

2. A contract in its narrower, and more proper, sense is an executory contract. It is the result of the concurrence of agreement and obligation, and may be defined as an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.[2]

It has been said that "a contract becomes executed when all is done that its terms require to be performed. Until that situation is attained the contract is executory."[3] When we speak of contracts we generally mean executory contracts, and it is of this kind of contract principally that this work is to treat. A contract in this sense results from the combination of the two ideas of "agreement" and "obligation." It is that form of agreement, or meeting of minds, which directly contemplates and creates an obligation; and the contractual obligation is that form of obligation which springs directly from agreement. It is necessary, therefore, to understand clearly what is meant by the terms "agreement" and "obligation," and how they may or may not concur so as to create a contract.

[2] The following are some of the definitions given in the books:

"An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Anson, Cont. (8th Ed.) 9.

"Every agreement and promise enforceable by law is a contract." Pol. Cont. 1.

"An agreement, upon sufficient consideration, to do or not to do a particular thing." Bl. Comm. 442; 2 Kent, Comm. 449.

"An agreement between two or more parties for the doing or the not doing of some particular thing." 1 Pars. Cont. 6.

"A contract or agreement not under seal may be defined to be an engagement entered into between two or more persons, whereby, in consideration of something done or to be done by the party or parties on one side, the party or parties on the other promise to do or omit to do some act." Chit. Cont. 7.

"A contract is a promise from one or more persons to another or others, either made in fact or created by law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed and not being in a form forbidden or declared inadequate by law." Bish. Cont. § 22. *See "Contracts," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 1.*

[3] Leadbetter v. Hawley, 59 Or. 422, 117 Pac. 289, 505. *See "Contracts," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 8.*

AGREEMENT

3. Agreement is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons.[4] There must be a meeting of two minds in one and the same intention.

From the very nature of agreement the first essential is the consent of the parties. There must be a meeting of two minds in one and the same intention. In the absence of this element there can be no agreement, and, therefore, no contract.

Two Parties Necessary

It is manifest that at least two parties are necessary. There may be more than two, but there cannot be less. It is therefore impossible for a man to make an agreement or contract with himself.[5]

Distinct Common Intention

It is also essential that there be a distinct intention, and an intention which is common to both parties; or, as it is sometimes expressed, the parties must assent to the same thing in the same sense.[6] If there is doubt or difference, there is no meeting of minds, and hence no agreement. If a person, when asked whether he will do a certain thing, says, "Very possibly," there is doubt, and no agreement is reached;[7] and if he says he will do something else, there is a difference, and therefore no agreement.

[4] See Anson, Cont. (4th Ed.) 3. "(1) An agreement is an act in the law, whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. (2) Such declaration may consist of (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or (b) a proposal made by some or one of them, and accepted by the others or other of them." Pol. Cont. 1.

[5] Thus a promise made by a person in his individual capacity to himself as executor is void. See GORHAM'S ADM'R v. MEACHAM'S ADM'R, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676, Throckmorton Cas. Contracts, 3, in which it is said, per Tyler, J.: "Until the concurrence of the two minds, there is no contract." Another reason why a man cannot enter into a contract with himself is because he cannot be under a legal obligation to himself. Post, p. 6. *See "Contracts," Dec. Dig. (Key-No.) §§ 11–13; Cent. Dig. §§ 42–46.*

[6] American Can Co. v. Agricultural Ins. Co. of Watertown, N. Y., 12 Cal. App. 133, 106 Pac. 720; Luckey v. St. Louis & S. F. R. Co., 133 Mo. App. 589, 113 S. W. 703. *See "Contracts," Dec. Dig. (Key-No.) § 14; Cent. Dig. § 48.*

[7] "I think I might purchase your horse at $200, the price you ask me," does not constitute an acceptance of an offer to sell the horse at $200. Stagg v. Compton, 81 Ind. 171. *See "Contracts," Dec. Dig. (Key-No.) § 14; Cent. Dig. § 48.*

Communication of Intention

Agreement further imports that there shall be a mutual communication between the parties of their intentions to agree, for without this neither could know the state of the other's mind. The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them.[8] Mere uncommunicated intention, though common to both parties, cannot constitute agreement. If a person asks another if he will do something, and the latter makes no reply, there is no agreement, even though he may intend to do it. A secret acceptance of a proposal cannot constitute agreement; nor, it is said, can agreement result where the intention of a party is communicated, not to the other party, but to a third person.[9] So, the fact that a party has changed his mind after making an offer and does not really intend to contract is of no significance if he does not communicate his change of intention to the other party before acceptance. And if one party has reasonably led the other to believe that he is making an offer the other may, by acceptance, convert such apparent offer into a contract although in fact no offer was intended. In like manner if a person to whom an offer has been submitted makes such statement or does such act with respect thereto as would lead an ordinarily prudent person, acting in good faith, to believe that the proposition had been accepted, and the proposer accordingly acts upon that assumption, a contract results, notwithstanding secret intentions of the offeree not to accept.[10] As we shall see, communication may be by conduct as well as by words.

Reference to Legal Relations

An agreement, to be recognized as such by the law, so as to constitute a contract, must be "an act in the law;"[11] that is, it must

[8] Rodgers, McCabe & Co. v. Bell, 156 N. C. 378, 72 S. E. 817 [cit. Clark on Contracts, pp. 2, 3]. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92.*

[9] Leake, Cont. 8. Intention may be communicated to the agent of a party, but this is equivalent to communication to the party himself. "In the case in hand," it was said, "the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance become such because accompanied by an unevinced mental determination." WHITE v. CORLIES, 46 N. Y. 467, Throckmorton Cas. Contracts, 1. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92.*

[10] Northrup v. Colter, 150 Mo. App. 639, 131 S. W. 364. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56, 71–92.*

[11] Pol. Cont. 2.

be, on the face of the matter, capable of having legal effects; and therefore, the intention of the parties must refer to legal relations, so that the courts, which can only deal with legal relations, may take cognizance of it. It must have reference to the assumption of legal rights and duties, as opposed to engagements of a social character and engagements of honor. If a person agrees to sell another a horse, the agreement refers to legal relations, and may result in contract; but, if a person agrees to go to another's house to dine, the intention refers merely to a social engagement, and no contract results. Legal consequences are not contemplated.[12]

Consequences must Affect the Parties

In order that agreement may result in obligation, so as to constitute contract, the consequences of the agreement must affect the parties themselves; otherwise the verdict of a jury, which is an agreement between the jurors, would satisfy the requirements.[13]

[12] It has been said that we may accept as a test of this question that the intention must relate to something which is of some value in the eye of the law, something which can be assessed at a money value. Anson, Cont. 2. It is true that the matter of an agreement must be reducible to a money value, to be enforceable; but this necessity does not spring from the nature of agreement. See post, p. 6. Furthermore, there may be agreements which will meet this requirement, and yet will not result in contract, because of the intention of the parties; that is to say, because of failure to refer to legal relations. A man who invites another to dine with him, or perform any other social function, goes to expense in making preparations, and if the engagement is broken, there is a loss which may be assessed at a money value, but this does not make the agreement a contract. The reason is that the parties do not contemplate legal relations and consequences. The engagement is merely a social one. The fact that the matter contemplated is reducible to a money value does not make the agreement a contract, unless, in addition to this, the parties intend to affect their legal relations. Pol. Cont. 2, note (a). See Earle v. Angell, 157 Mass. 294, 32 N. E. 164. *See "Contracts," Dec. Dig. (Key-No.) §§ 7, 14; Cent. Dig. §§ 9, 48.*

[13] If a fund is held by the trustees under a will, to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying J. S., this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees towards any other of them. There is a common duty to the beneficiary, but no mutual obligation." Pol. Cont. 3.

OBLIGATION

4. Obligation is a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value.[14]

Obligation is a legal bond or tie whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group. Since there can be no contract without obligation, every element essential to the creation of an obligation is essential to the creation of a contract.

Two Parties Necessary

From the very nature of things, two persons are necessary. There may be more than two, but there cannot be less. A man cannot be under a legal obligation to himself, or even to himself in conjunction with others. In an English case, where a man had borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. "The covenant, to my mind, is senseless," said Pollock, C. B. "I do not know what is meant, in point of law, by a man paying himself." [15] And in a Massachusetts case it was said that "it is a first principle that, in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee." [16]

The Parties Must be Definite

The parties to an obligation must be definite, both those having the right to exercise control and those bound. A man cannot be under an obligation to the entire community. His liabilities to the political society of which he is a member are matters of public or criminal law. Nor can the whole community be under an obligation to him. The correlative right on his part would be a right in rem, and would constitute property, as opposed to obligation.

[14] Anson, Cont. (4th Ed.) 7. "By 'obligation' we mean the relation that exists between two persons, of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing." Pol. Cont. 3.

[15] Faulkner v. Lowe, 2 Exch. 595. *See "Contracts," Dec. Dig. (Key-No.) §§ 11–14; Cent. Dig. §§ 42–48.*

[16] Eastman v. Wright, 6 Pick. (Mass.) 316. And see Allin v. Shadburne's Ex'r, 1 Dana (Ky.) 68, 25 Am. Dec. 121. See, also, ante, p. 3, note 5. *See "Contracts," Dec. Dig. (Key-No.) §§ 11–14; Cent. Dig. §§ 42–48.*

Whether the right is to personal freedom or security, to character, or to those more material objects which we commonly call property, it imposes a corresponding duty on all to forbear from molesting the right. Such a right is a right in rem. It is of the essence of obligation that the liabilities imposed are imposed on definite persons, and are themselves definite. The rights which it creates are rights in personam.[17] There are apparent exceptions to this rule in the case of contracts made by and with cities and other municipal corporations and with the state. The state represents the public, and such is also the case with municipal corporations, but this fact does not prevent contracts with them. A municipal corporation or the state is a definite party, distinct from the members of the community.

The Rights and Liabilities Must be Definite

To constitute an obligation enforceable in law, the rights and liabilities given and imposed must be definite. In other words, it must relate to definite acts and forbearances. The freedom of the person bound by an obligation is not curtailed generally, but is limited in reference to some particular act or series or class of acts. If the thing to be done or forborne is so indefinite or uncertain that the court cannot say what was agreed upon, it cannot enforce the agreement.[18] An agreement not enforceable creates no obligation, and therefore cannot result in contract.

The Thing to be Done or Forborne must be Reducible to a Money Value

The matter of the obligation—that is, the thing to be done or forborne—must possess, or must be reducible to, a pecuniary value. It must have some ascertainable value, in order to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can annoyance and disappointment, caused by the breach of a social engagement. Courts of law can only deal with matters to which the parties have attached an importance estimable by a standard of value of which the courts may take cognizance.

CONCURRENCE OF AGREEMENT AND OBLIGATION

5. An agreement resulting in contract is that form of agreement which directly contemplates and creates an obligation; and the contractual obligation is that form of obligation which springs directly from agreement.

[17] Anson, Cont. (4th Ed.) 5.

[18] See post, p. 54.

Agreement Broader Term than Contract

"Agreement" is a broader term than "contract," and includes acts in the law of two kinds besides those which we ordinarily term contracts:

(1) An agreement, for instance, may not create an obligation, and therefore, in reason, may not result in a contract, because its effect is concluded as soon as the parties have expressed their common assent. Such are conveyances of land without covenants, gifts, and sales of chattels for cash, with immediate delivery, and without warranty. The agreement of the parties effects at once a transfer of rights in rem, and leaves no obligation subsisting between them. Such agreements are called "executed contracts," but they create no outstanding contractual obligation, and it is at least questionable whether they can properly be termed contracts.[19] It is otherwise if the conveyance is with covenants annexed, or if the sale is on future delivery, or on credit, or with a warranty.

(2) Again, an agreement may create obligations only incidentally or remotely, and therefore not constitute a contract; the essence of contract being in the fact that the direct purpose of the agreement is to create an obligation. Such agreements have the characteristic just alluded to of effecting their main object immediately upon the expression of the intention of the parties, but they differ from simple conveyances and gifts, not only in creating outstanding obligations between the parties, but sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement. Marriage, for instance, sometimes erroneously called a contract, effects a change of status from the moment the consent of the parties is expressed before a competent authority. At the same time it creates obligations between the parties which are incidental to the transaction, and to the immediate objects of the expression of consent or agreement. So,

[19] There is the highest authority for speaking of conveyances of land without covenants, gifts, and sales of goods for cash, with immediate delivery, and without warranty, as executed contracts. 2 Bl. Comm. 443; 1 Story, Cont. (4th Ed.) § 22; Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162. The propriety, however, of calling such agreements contracts has, with reason, been questioned. Anson, Cont. 3. It is of the essence of contract, as a legal conception, that it shall contemplate and create a right in personam; that it shall impose an obligation on one of the parties to do or forbear from doing some act. An agreement by which a person binds himself to convey land would therefore be a contract; but how can a conveyance be called a contract? It creates no obligation, but, at the very moment the parties agree, the agreement is carried out. To the effect that an executed gift is not a contract, see Wheeler v. Glasgow, 97 Ala. 700, 11 South. 758. *See "Contracts," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 8; "Vendor and Purchaser," Dec. Dig. (Key-No.) § 53; Cent. Dig. § 84.*

also, a settlement of property in trust for persons unborn effects much more than the mere conveyance of a legal estate to the trustee. It imposes on him incidental obligations, some of which may not come into existence for a long time. It creates possibilities of obligation between him and persons who are not yet in existence. These obligations are the result of agreement, but they are not contract.[20]

Sources of Obligation [21]*—Directly from Agreement*

Obligation may arise directly from agreement. Here we find that form of agreement which constitutes contract. An offer is made by one person and accepted by another, so that one consents to intend, and the other to expect, the same thing; and the result of this agreement is a legal tie, binding the parties to one another in respect to some future act or forbearance.

Same—Delict or Tort

Obligation may arise from delict or tort. This occurs where a primary right to forbearance has been violated; where, for instance, a right to property, to security, or to character has been violated by trespass, assault, or defamation. The wrongdoer is bound to pay to the injured party whatever damages he has sustained. Such an obligation is not created by the free will of the parties, or by agreement, but springs up immediately upon the occurrence of the wrongful act. The person injured has a cause of action which is said to arise ex delicto, as distinguished from such as arise ex contractu.[22]

Same—Breach of Contract

Obligation may arise from breach of contract. While one person is under promise to another, the promisee has a right against the promisor to performance of the promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But, if the promisor breaks his promise, the promisee's right to performance has been violated, and, even if the contract is not discharged, a new obligation springs up,—a right of action for damages, similar to that which arises upon a delict or tort. The cause of action results from the breach of contract, and is said to arise ex contractu.

Same—Quasi Contract

There are certain obligations which arise neither from tort nor from contract, but which are imposed by law without assent of the

[20] Anson, Cont. (4th Ed.) 3; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Ditson v. Ditson, 4 R. I. 87; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; Watkins v. Watkins, 135 Mass. 83. *See "Contracts," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 21–40.*

[21] Anson, Cont. (4th Ed.) 7.

[22] Leake, Cont. 3.

party bound. These obligations are not contracts, for there is no agreement; but they are clothed with the semblance of contract for the purpose of remedy, and are described by the term quasi contract.[23] Obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done or forborne by one party in respect of another. This kind of obligation is called a "contract of record." It may arise from entry of judgment by consent of the parties, in which event the element of agreement is present; but, on the other hand, it may arise against the will of the party bound thereby, in which case there is no element of agreement, and therefore no true contract. Such an obligation is quasi contractual.[24]

Again, a quasi contractual obligation may arise by the acts of the parties. A person pays something which another ought to pay, or receives something which another ought to receive, and the law imposes on him the duty to make good to the other party the advantage to which the other is entitled. The term "implied contract" is frequently applied to obligations of this class. Its use is objectionable, because the same term is frequently applied to true contracts in which the agreement of the parties is evidenced by conduct, and which are hence called "implied contracts," in distinction to contracts in which the agreement is evidenced by words, and which are said to be express.[25]

Same—Indirectly from Agreement—Marriage—Trusts

Finally, obligation may spring from agreement, and yet be distinguishable from contract. As explained in speaking of agreement, this is the case with obligations incidental to such acts as marriage and the creation of a trust. Contractual obligations may arise incidentally to an agreement which has for its direct object the transfer of property. In the case of a conveyance of land with cov-

[23] City of Chicago v. Pittsburg, C., C. & St. L. R. Co., 146 Ill. App. 403 [affirmed 242 Ill. 30, 89 N. E. 648]; Leonard v. State, 56 Tex. Cr. R. 307, 120 S. W. 183. And see post, p. 623. Such obligations are also variously called "implied contracts" and "constructive contracts." Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 N. E. 1085. *See "Contracts," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 7; "Judgment," Dec. Dig. (Key-No.) §§ 2, 3; Cent. Dig. § 11.*

[24] Post, p. 624.

[25] For full discussion of the senses in which the term "implied contract" is used, see HERTZOG v. HERTZOG, 29 Pa. 465, Throckmorton Cas. Contracts, 5; Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 S. W. 461; Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 N. E. 1085. See, also, post, p. 20. *See "Contracts," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–6.*

enants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale, and is so easily distinguishable that it may be dealt with as a contract. But in cases of trust or marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent, or at any rate remote from its main purpose or immediate operation. To create an obligation is the one object which the parties have in view when they enter into that form of agreement which is called contract.

PROMISE

6. A promise is the communication by a person of an intention and willingness to be bound to do or to forbear from doing something at the request or for the use of another, when, but not before, that declaration has become binding by its acceptance by the promisee so as to create an obligation.[26] A promissory expression before acceptance is merely an offer of a promise.

We are in the habit of considering as the essential feature of contract a promise by one or more parties to another or others to do or to forbear from doing certain specified acts; and many of the books use the term "promise," rather than "agreement," to define contract. "In an agreement as the source of a legal contract," it is said, "the matter intended and agreed imports that the one party shall be bound to the other in some act or performance, which the latter shall have a legal right to enforce." The signification of an intention to do some act, or observe some particular course of conduct, made by the one party to the other, and accepted by him, for the purpose of creating a right to its accomplishment, is called a promise.[27]

The term "promise" is used to signify a binding promise, as opposed to a mere offer of a promise. A promissory expression amounting to an offer of a promise does not become a promise until it becomes binding by its acceptance by the person to whom it is made. Before it is accepted it is a mere offer of a promise, called in the civil law a "pollicitation."[28] It must also be noted that it is not every statement of intention that will amount to an offer of a promise which by acceptance will be turned into a promise. An offer differs from a mere statement of intention in that it imports a

[26] Anson, Cont. (4th Ed.) 4; Pol. Cont. 1.
[27] Leake, Cont. 13.
[28] See post, p. 26.

willingness to be bound to the party to whom it is made. If a person says to another, "I intend to sell my horse if I can get $100 for it," there is no offer that can be turned into an agreement, but merely a declaration of intention. There is no declaration of willingness to be bound. If, however, he says, "I will sell you my horse if you will give me $100 for it," there is an offer, and, if it is accepted, there is a contract, consisting of mutual binding promises to deliver the horse on the one side, and to accept and pay for it on the other.

Looking at a contract, then, in the light of a promise, we may say that there are three stages necessary to the making of that sort of agreement which results in a contract: (1) There must be an offer; (2) there must be an acceptance of the offer, resulting in a promise; and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation.

The promise results from the agreement of the parties, and necessarily results from every agreement which directly contemplates and creates an obligation. The agreement makes the contract, and the promise is merely a feature of the contract.

VOID, VOIDABLE, AND UNENFORCEABLE AGREEMENTS

7. A void agreement is one that is entirely destitute of legal effect.

8. A voidable contract is one that is capable of being affirmed or rejected at the option of one of the parties, but which is binding on the other.

9. An unenforceable contract is one that is valid, but incapable of being sued upon or proved.

We have seen, and in dealing with the formation of contract we shall see more in detail, that certain requisites are essential, and, if they are absent, the contract is said to be void. By this it is meant that it has no legal effect whatever. Clearly, in such a case, there is no contract at all, and it is a misuse of terms to speak of it as such. A transaction or agreement cannot be void and be called a contract, so it is more accurate to say that the transaction or agreement is void.

A voidable contract is not destitute of legal effect, but may be valid and binding. It is a contract that is capable of being affirmed or rejected at the option of one of the parties. It is binding if he chooses to affirm it, and is of no effect if he chooses to reject it. The other party has no say in the matter. Such is the case, as we

shall see, with contracts into which one of the parties has induced the other to enter by means of fraud. The latter may repudiate the contract, or, if he sees fit, he may waive the fraud, and hold the former to his bargain.

It will seem, at first thought, that certain agreements said to be void are not so in fact. For instance, as we shall see, an agreement may be void on the ground of mistake, or, in a few cases, because of the infancy of one of the parties; but, if the mistake or infancy is not pleaded in the action to enforce it, the parties will be held bound. Such an agreement, however, is just as void as an agreement to do something which the law forbids. The cause of nullity is latent, but this does not alter the character of the transaction. It is void if the defendant chooses to prove it so.[29]

If the defendant in these cases may, at his option, avoid the contract, or let it stand, there would seem to be a certain unreality in the distinction between void and voidable agreements; but this is not so in fact. In case of voidable agreements there is a contract, though it is marked by a flaw; and the party who has the option may affirm it in spite of the flaw. Where, however, an agreement is void, it falls to the ground as soon as its nullity becomes apparent. It is incapable of affirmance. Another distinction is in the fact that in case of voidable contracts innocent third persons, acting in good faith, may acquire rights thereunder, and thereby cut off the right to avoid it; but no such rights can be acquired where the transaction is void.[30]

A contract which is unenforceable cannot be set aside at the option of one of the parties to it. The obstacles to its enforcement do not touch the existence of the contract, but only set difficulties in the way of action being brought or proof given. The contract is valid, but because of these obstacles it cannot be enforced. Such is a contract, as we shall see, which fails to comply with some of the provisions of the statute of frauds, requiring writing, and so cannot be proved; or a contract which has become barred by the statute of limitations. The defect in these contracts is not irremediable. In the first it may be remedied by supplying the writing, and in the second by procuring a proper acknowledgment of the barred debt; but it will be noticed that the defect can be remedied only with the concurrence of the party to be made liable.

[29] Anson, Cont. (4th Ed.) 204.

[30] Post, p. 295.

ESSENTIALS OF CONTRACT

Having ascertained the particular features of contract as a juristic conception, the next step is to ascertain how contracts are made. A part of the definition of contract being that it is an agreement enforceable at law, it follows that we must analyze the elements of a contract such as the law will hold to be binding between the parties to it.

10. As there must be an agreement directly contemplating and resulting in an obligation, and the agreement must be enforceable in the law, therefore—

(a) There must be a distinct communication by the parties to one another of their intention, or an offer and acceptance.

(b) The agreement must possess the marks which the law requires in order that it may affect the legal relations of the parties, and be an act in the law. Therefore—

(1) It must be in the form required by law.

(2) There must be a consideration, when required by law.

(c) The parties must be capable in law of making a valid contract.

(d) The consent expressed in offer and acceptance must be genuine.

(e) The objects which the contract proposes to effect must be legal.[31]

Where all of these elements coexist, a valid contract is the result. If any one of them is absent, the agreement is in some cases merely unenforceable; in some voidable at the option of one of the parties; and in some absolutely void. We shall now take up in turn each of these elements in separate chapters.

[31] Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

CHAPTER II

OFFER AND ACCEPTANCE

11–13. In General.
14–15. Communication by Conduct—Implied Contracts.
16. Communication of Offer.
17. Necessity and Effect of Acceptance.
18–20. Communication of Acceptance.
21. Character, Mode, Place, and Time of Acceptance.
22–23. Revocation of Offer.
24. Lapse of Offer.
25. Offers to the Public Generally.
26. Offer as Referring to Legal Relations.

IN GENERAL

11. To constitute a contract, the expression of common intention must generally, if not always, arise from an offer made by one party to another, and an acceptance by the latter, with the result that one or both are bound by a promise.

12. The offer may be—

(a) Of a promise, or

(b) Of an act.

13. The acceptance may be—

(a) Simple assent; but this applies to contracts under seal only.

(b) Giving of a promise.

(c) Doing of an act.

In practical matters, and for the purpose of creating obligations, every expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer, or to offer and acceptance.[1] Thus, if a person agrees to sell an article to another for a certain price, and the latter agrees to buy it, we can trace the process to the moment when the seller says in words

[1] Anson, Cont. (4th Ed.) 11; Leake, Cont. 12; Thruston v. Thornton, 1 Cush. (Mass.) 91. Pollock objects that this analysis does not properly apply to a case in which the consent of the parties is declared in a set form,—as where they both execute a deed or sign a written agreement. Pol. Cont. 4. But he adds that, "notwithstanding the difficulties that arise in making proposal and acceptance necessary parts of the general conception of contract, there is no doubt that in practice they are the normal and most important elements." Id. 8. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56, 71–92.*

or by conduct, "Will you give me so much for the article?" and the buyer replies, "I will;" or when the buyer says, "Will you take so much for the article?" and the seller says, "I will." There is always this question and answer, or offer and acceptance, though in many cases it is not in so many words. A tradesman displaying his goods says in act, though not in words, "Will you buy my goods at my price?" and a customer taking goods with the tradesman's cognizance virtually says, "I will." The proprietor of a public conveyance, by running it in such a way and place as to invite people to use it, virtually says, "Will you pay me the fare if I carry you?" and one who gets into the conveyance to be carried, by his conduct says, "I will," as plainly as if he were to use the words. And so all contracts, or voluntary obligations, may be reduced to question and answer, either in words, or by conduct, or both. The question is the offer; the answer the acceptance of the offer.

A written contract, the terms of which have been agreed upon by the parties, but which they have further agreed is to become binding only upon its execution and delivery, is an apparent exception to the above rule that every contract originates in an offer and acceptance. But the delivery of the written instrument by one party, either in person or through his agent, may be said to constitute an offer, and its receipt and approval by the other party an acceptance.

Forms of Offer and Acceptance

(1) A contract may originate in the offer of a promise, and its acceptance by simple assent, but this applies only to contracts under seal, for, as will presently be seen, the law requires a consideration to support a promise not under seal, and mere assent is not enough. Thus, where one person promises another by writing under seal that he will do a certain thing, or pay a certain sum, and the promisee assents to the proposal, both are bound, and there is a contract.[2]

(2) As already shown, the presence of a public conveyance on the street is a constant offer by its proprietor to carry persons, and when a person steps into the conveyance he accepts the offer, and promises to pay the fare. This is an offer of an act for a promise.

(3) If a person who has lost property offers by advertisement a reward to any person who shall return it, he offers a promise for an act, and when a person returns the property he accepts and performs the act, and the promise becomes binding.

[2] As to offers and contracts under seal, see post, pp. 62 et seq.

(4) If a person offers another to pay him a certain sum on a future day if the latter will promise to perform certain services for him before that day, or, vice versa, he offers a promise for a promise, and where the person to whom the offer is made accepts it by promising to perform the services or to pay, as the case may be, both parties are bound, the one to do the work and the other to make the payment. This is the offer of a promise for a promise.

A contract in which there is an offer of a promise for an act is sometimes called a "unilateral" contract, because there is a subsisting obligation on the part of only one party; and it is distinguished from a contract consisting of an offer of a promise for a promise, which is said to be "bilateral" because imposing an existing obligation on each party.[8]

Executed and Executory Consideration

It will be noticed that cases (2) and (3) differ from (4) in an important respect. In (2) and (3) the contract is formed by one party doing all he can be required to do under the contract. The contract is formed by performance on one side, and it is this performance which makes obligatory the promise on the other. The outstanding obligation is all on one side. In (4) each party is bound to some act or forbearance in the future. There is an outstanding obligation on both sides. Where the benefit, in contemplation of which the promise is made, is done at the same time that the promise acquires a binding force,—where it is the doing of the act that concludes the contract,—then the act so done is called an executed or present consideration for the promise. Where a promise is given for a promise, each forming the consideration for the other, the consideration is said to be executory or future.

[8] Great Northern R. Co. v. Witham, 9 Law Rep. (C. C. P.) 12, 19; Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41; Nicholson v. Acme Cement Plaster Co., 145 Mo. App. 523, 122 S. W. 773; 2 Ill. Law Review, 463 (Roscoe Pound). The word "unilateral" is also sometimes used to express the idea of an agreement not binding because lacking in mutuality of obligation. For criticism of this use, see High Wheel Auto Parts Co. v. Journal Co. of Troy, 50 Ind. App. 396, 98 N. E. 442. *See "Contracts," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 21–40.*

COMMUNICATION BY CONDUCT—IMPLIED CONTRACTS

14. An offer or its acceptance may be made by conduct as well as by words.

15. Where the terms of a contract are shown by the acts of the parties, the contract is said to be implied. It is, however, implied as a matter of fact. There is an agreement in fact, evidenced by acts.

From what has already been said as to the possible forms of offer and acceptance, it will have been seen that conduct may take the place of written or spoken words in the making of contracts.[4]

If a person asks another to perform a service for him for compensation, the latter may accept the offer simply by performing the service, unless a particular form of acceptance is prescribed in the offer. His acceptance is inferred or implied from his conduct.[5]

Again, if a person allows another to work for him under such circumstances that no reasonable man would suppose that the latter means to do the work for nothing, he will be liable to pay for it. The doing of the work is an offer; the permission to do it, or acquiescence in its being done, is the acceptance. The offer and acceptance are inferred or implied as a matter of fact from the circumstances.[6]

[4] Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Houghwout v. Boisaubin, 18 N. J. Eq. 315; Smith v. Ingram, 90 Ala. 529, 8 South. 144; Wetmore v. Mell, 1 Ohio St. 26, 59 Am. Dec. 607; Sturges v. Robbins, 7 Mass. 301; Train v. Gold, 5 Pick. (Mass.) 384; New York & N. H. R. Co. v. Pixley, 19 Barb. (N. Y.) 428; Porter v. Everts' Estate, 81 Vt. 517, 71 Atl. 722. Taking goods; implied promise to pay for them. Stoudenmire v. Harper, 81 Ala. 242, 1 South. 857. Sending goods in response to an order is an acceptance of the offer to buy contained in the order. Crook v. Cowan, 64 N. C. 743; Briggs v. Sizer, 30 N. Y. 652; Harvey v. Johnston, 6 C. B. 295. Retention of the order, if explained, is not an acceptance. Briggs v. Sizer, 30 N. Y. 652. Taking possession of property in accordance with a letter offering to sell it is an acceptance. Dent v. Steamship Co., 49 N. Y. 390. *See "Contracts," Dec. Dig. (Key-No.) §§ 16, 18, 22; Cent. Dig. §§ 49–56, 71–92.*

[5] See Reif v. Paige, 55 Wis. 503, 13 N. W. 473, 42 Am. Rep. 731; Coston v. Morris, 51 Hun, 643, 4 N. Y. Supp. 89. See, also, post, p. 20, and notes. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92.*

[6] Paynter v. Williams, 1 Cromp. & M. 810; Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347; Huck v. Flentye, 80 Ill. 258; De Wolf v. City of Chicago, 26 Ill. 444; Hartupee v. City of Pittsburgh, 97 Pa. 107; Thomas v. Coal Co., 43 Mo. App. 653; Lockwood v. Robbins, 125 Ind. 398, 25 N. E. 455; Wojahn v. National Union Bank of Oshkosh, 144 Wis. 646, 129 N. W. 1068. No promise, however, on the part of a person benefited by work, can be implied where the work was done under a special contract with another person. Walker

So, also, if a person sends goods to another, not under such circumstances as reasonably to lead the latter to suppose them a gift, and the latter uses or consumes them, he will be liable on an implied promise to pay what the goods are reasonably worth. The offer is made by sending the goods; the acceptance, by their use or consumption, which is in fact a promise to pay their price.[7] In like manner, a subscriber to a newspaper or magazine remains liable for the subscription price so long as he takes or receives the publication from the post office, even though he has directed the publisher to discontinue it.[8]

Where conduct is relied on as constituting acceptance, it must be something more than mere silence; it must be silence under such circumstances as to amount to acquiescence or assent.[9]

v. Brown, 28 Ill. 378, 81 Am. Dec. 287; Massachusetts General Hospital v. Fairbanks, 129 Mass. 78, 37 Am. Rep. 303. A promise cannot be implied where the whole matter is covered by an express contract. See Phelps v. Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; Waite v. Merrill, 4 Greenl. (Me.) 102, 16 Am. Dec. 238; Stockett v. Watkins' Adm'rs, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; King v. Woodruff, 23 Conn. 56, 60 Am. Dec. 625; Appleton Waterworks Co. v. City of Appleton, 132 Wis. 563, 113 N. W. 44. A mere expectation by one party to be paid for his services is not sufficient to constitute a contract, if the other party reasonably supposes them to be gratuitous. Harley v. United States, 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92.*

[7] Hart v. Mills, 15 Mees. & W. 87; Manor v. Pyne, 3 Bing. 288; Larkin v. Lumber Co., 42 Mich. 296, 3 N. W. 904; Kinney v. Railroad Co., 82 Ala. 368, 3 South. 113; Indiana Mfg. Co. v. Hayes, 155 Pa. 160, 26 Atl. 6; Empire Steam Pump Co. v. Inman, 59 Hun, 230, 12 N. Y. Supp. 948; Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 718; Hobbs v. Whip Co., 158 Mass. 194, 33 N. E. 495. The person to whom the goods are sent must in some way deal with them as his own in order that an acceptance may be implied. If he does not choose to take them, he is not bound to return them. Pol. Cont. 11. Where goods are ordered, and only a part are sent, the person so ordering need not accept them. If he does so, however, he impliedly agrees to pay what the goods are reasonably worth. Chapman v. Dease, 34 Mich. 375; Dermott v. Jones, 23 How. 220, 16 L. Ed. 442; Star Glass Co. v. Morey, 108 Mass. 570; Goodwin v. Merrill, 13 Wis. 658; Richards v. Shaw, 67 Ill. 222. But see Kein v. Tupper, 52 N. Y. 550. *See "Sales," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 39–43; "Contracts," Cent. Dig. §§ 71, 75.*

[8] Weatherby v. Borham, 5 C. & P. 228; Fogg v. Portsmouth Atheneum, 44 N. H. 115, 82 Am. Dec. 191; Ward v. Powell, 3 Har. (Del.) 379; Austin v. Burge, 156 Mo. App. 286, 137 S. W. 618. But no contractual relation arises from the mere receipt by one of a publication to which he has not subscribed. See cases cited supra. *See "Contracts," Dec. Dig. (Key-No.) §§ 4, 27; Cent. Dig. §§ 4–6, 121–132.*

[9] Royal Ins. Co. v. Beatty, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622; O'Neal v. Knippa (Tex. Sup.) 19 S. W. 1020. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92.*

"Implied Contracts"—The Term Explained

Contracts implied from the conduct of the parties are implied as a matter of fact, and not as a matter of law. There is, in fact, an agreement between the parties, though it is shown by their acts, and not by express words.[10] If a man says to another in words, "I will sell you this article for the market price," and the latter, taking it, says in words, "I accept your offer, and will pay the price," there is an express contract, evidenced by express words. If a man sends another goods under such circumstances as to show that he expects payment, and the latter accepts and consumes the goods, there is an implied contract that he will pay the market price, evidenced by the conduct of the parties in sending the goods on the one side, and in accepting and using them on the other. Sending the goods is an offer to sell them, and accepting and using them is an acceptance of the offer. There is no difference in the two contracts except in the evidence by which the agreement is shown.[11] The distinction between contracts implied from the conduct of the parties and so-called "implied contracts" which are properly "quasi contracts," has been explained.[12]

Same—Relationship of the Parties

Where one person renders services for another, or supports another, the relationship of the parties is of great weight in determining their intention. If the relationship is that of parent and child, even though the child has attained his or her majority, there is a presumption that no compensation was intended;[13] and this applies not only where the relationship of parent and child actually exists, but also where one of the parties stands in loco parentis to the other.[14] In some states the presumption that the services were

[10] Pol. Cont. 9–11; Leake, Cont. 11; HERTZOG v. HERTZOG, 29 Pa. 465; Throckmorton Cas. Contracts, 5. *See "Contracts," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–6.*

[11] Bixby v. Moor, 51 N. H. 402; Fordtran v. Stowers, 52 Tex. Civ. App. 226, 113 S. W. 631; Wojahn v. National Union Bank of Oshkosh, 144 Wis. 646, 129 N. W. 1068. *See "Contracts," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–6.*

[12] Ante, p. 10.

[13] HERTZOG v. HERTZOG, 29 Pa. 465, Throckmorton Cas. Contracts, 5; Young v. Herman, 97 N. C. 280, 1 S. E. 792; Bantz v. Bantz, 52 Md. 693; Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496; McGarvy v. Roods, 73 Iowa, 363, 35 N. W. 488; Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349; In re Young's Estate, 148 Pa. 575, 24 Atl. 124; Howe v. North, 69 Mich. 272, 37 N. W. 213; Allen v. Allen, 60 Mich. 635, 27 N. W. 702; Grant v. Grant, 109 N. C. 710, 14 S. E. 90. *See "Executors and Administrators," Dec. Dig. (Key-No.) § 221; Cent. Dig. § 901.*

[14] Dodson v. McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408; Ormsby v. Rhoades, 59 Vt. 505, 10 Atl. 722; Starkie v. Perry, 71 Cal. 495, 12 Pac. 508;

gratuitous arises only in the case of parent and child, or child and person standing in loco parentis.[15] The presumption has frequently been declared to exist, however, where the parties were grandparent and grandchild,[16] or were brothers,[17] or brother and sister.[18] And the rule as generally applied extends to all cases where the parties occupy a near relationship, or, although not related at all, or only distantly, are members of the same family, and the services consist either in household or other family duties by one party, and support and maintenance by the other.[19] As said in a New Jersey case,[20] "the reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between the members of a household services are gratuitously rendered." Some courts have refused to apply the presumption against an implied contract where the benefit is wholly on one side, as where one relative supports and nurses another who performs no services in return.[21]

Wyley v. Bull, 41 Kan. 206, 20 Pac. 855; Appeal of Barhite, 126 Pa. 404, 17 Atl. 617; Harris v. Smith, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702. *See "Executors and Administrators," Dec. Dig. (Key-No.) § 221; Cent. Dig. § 901.*

[15] In re Shubart's Estate, 154 Pa. 230, 26 Atl. 202. *See "Executors and Administrators," Dec. Dig. (Key-No.) § 221; Cent. Dig. § 901; "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22.*

[16] Jackson's Adm'r v. Jackson, 96 Va. 165, 31 S. E. 78. *See "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22.*

[17] Chapman v. Chapman, 87 Ill. App. 427. *See "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22.*

[18] Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678; Fuller v. Fuller, 21 Ind. App. 42, 51 N. E. 373. *See "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22.*

[19] Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678; Cone v. Cross, 72 Md. 102, 19 Atl. 391; Curry v. Curry, 114 Pa. 367, 7 Atl. 61; Feiertag v. Feiertag, 73 Mich. 297, 41 N. W. 414; Patterson v. Collar, 31 Ill. App. 340; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; Reeves' Estate v. Moore, 4 Ind. App. 492, 31 N. E. 44; Gerz v. Weber, 151 Pa. 396, 25 Atl. 82.

Where a woman married a man and lived with him till his death, but afterwards learned that he had a wife living, held that she could not recover in an action of contract against his administrator for her services in keeping house. Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721. *See "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22.*

[20] Disbrow v. Durand, ante, note 19. *See "Executors and Administrators," Dec. Dig. (Key-No.) §§ 206, 221; Cent. Dig. §§ 733, 901.*

[21] Mark's Adm'r v. Boardman (Ky.) 89 S. W. 481, 1 L. R. A. (N. S.) 819

In all cases the presumption may be overcome by evidence of an agreement for compensation.[22] And, as said in an Indiana Case,[23] a contract will be implied, notwithstanding the relationship, where there is hope of compensation on one side and expectation to award it on the other.

COMMUNICATION OF OFFER

16. An offer is made when it is communicated to the offeree.

It is plain that without communication of the offer there can be no consensus, and therefore no contract.

Thus, in the case of an offer of a promise for an act, if the offeree does the act in ignorance of the offer, he is not entitled to the benefit of the promise. It is for this reason that a person who does an act for which a reward is offered, in ignorance of the offer, cannot claim the reward.[24]

Again, if a person does work for another under such circumstances that it could not reasonably be supposed that he meant to work for nothing, the doing of the work is an offer, and acquiescence in its doing may be an acceptance. But if the offer is not communicated to the person to whom it is intended to be made, there can be no acquiescence.

Thus, where a person who had been engaged to command a ship threw up his command during the voyage, but helped to work the

See "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22; "Contracts," Cent. Dig. § 130.

[22] As to the sufficiency of the evidence to show that there was a contract, see Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. 506; McMillan v. Page, 71 Wis. 655, 38 N. W. 173; Shane v. Smith, 37 Kan. 55, 14 Pac. 477; Petty v. Young, 43 N. J. Eq. 654, 12 Atl. 392; Appeal of Lindsey (Pa.) 15 Atl. 434; Doremus v. Lott, 49 Hun, 284, 1 N. Y. Supp. 793; Hill v. Hill, 121 Ind. 255, 23 N. E. 87; Hogg v. Laster, 56 Ark. 382, 19 S. W. 975; Henzler's Estate v. Bossard, 6 Ind. App. 701, 33 N. E. 217; Zimmerman v. Zimmerman, 129 Pa. 229, 18 Atl. 129, 15 Am. St. Rep. 720; Havens v. Havens, 50 Hun, 605, 3 N. Y. Supp. 219; Spitzmiller v. Fisher, 77 Iowa, 289, 42 N. W. 197; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11; Kirkpatrick v. Gallagher, 34 S. C. 255, 13 S. E. 450; McCormick v. McCormick, 1 Ind. App. 594, 28 N. E. 122; Story v. Story, 1 Ind. App. 284, 27 N. E. 573; Stock v. Stoltz, 137 Ill. 349, 27 N. E. 604; Wayman v. Wayman (Ky.) 22 S. W. 557; O'Kelly v. Faulkner, 92 Ga. 521, 17 S. E. 847. *See "Executors and Administrators," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1858–1876; "Work and Labor," Dec. Dig. (Key-No.) § 28; Cent. Dig. §§ 17, 55.*

[23] Huffman v. Wyrick, 5 Ind. App. 183, 31 N. E. 823. *See "Work and Labor," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 11½–22; "Contracts," Cent. Dig. § 130.*

[24] Post, p. 49.

vessel home, and then claimed compensation for such services, it was held that he could not recover.[25] Evidence "of a recognition or acceptance of services," it was said, "may be sufficient to show an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services;" but in this case the defendant never had such an option, and repudiated the services when he became aware of them. The offer, not having been communicated to the owner of the vessel, did not admit of acceptance, and could give no rights against him. As said in the case mentioned: "Suppose I clean your property without you knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"

Terms of Offer Partly Uncommunicated

If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included, unless he knew those terms, or had their existence brought to his knowledge, and was capable of informing himself of their nature.[26] Illustrations of this frequently arise in the case of contracts of carriage or bailment with a railroad company or warehouseman, evidenced by a ticket or other document containing terms modifying the liability of the company or warehouseman as carrier or bailee, though, of course, they may arise in the case of other contracts.

The law on this point was thus stated in an English case: "If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; if he

[25] Taylor v. Laird, 25 L. J. Exch. 329. And see Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237, in which it was held that a person who removed another's property without the latter's knowledge, to prevent its destruction by fire, could not recover for his services, because no offer was ever communicated. See, also, Thornton v. Village of Sturgis, 38 Mich. 639; Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107; Burrows v. Ward, 15 R. I. 346, 5 Atl. 500; Brennan v. Chapin (Com. Pl.) 19 N. Y. Supp. 237; Mann v. Farnum, 17 Colo. 427, 30 Pac. 332. *See "Contracts," Dec. Dig. (Key-No.) § 18; Cent. Dig. §§ 49–56.*

[26] In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be published, so that he may take advantage of statements contained therein, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby. Tichnor v. Hart, 52 Minn. 407, 54 N. W. 369. *See "Contracts," Dec. Dig. (Key-No.) §§ 18, 203; Cent. Dig. §§ 49–56, 913–915.*

knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivery to him of the ticket in such a manner that he could see that there was writing on it, was, in the opinion of the jury, reasonable notice that the writing contained conditions." [27] In all cases, however, the question is the same, namely, have the terms of the offer been fully communicated to the acceptor? And the tendency of judicial decision is towards a general rule that, if a man accepts a document which purports to contain the terms of an offer, he is bound by all the terms, though he may not choose to inform himself of their tenor, or even of their existence.[28]

Same—Offer Under Seal

It has been said that an offer under seal constitutes an exception to the inoperative character of an uncommunicated offer, at least to the extent that the party making an offer in this form is bound to leave it open until the other party has had an opportunity to accept or reject it. This doctrine, however, is based on a mistaken conception of the nature and effect of a deed or instrument under seal. And an offer under seal is no exception to the general rule that an offer is wholly without

[27] Parker v. Railway Co., 2 C. P. Div. 423. See, also, Richardson v. Rountree [1894] App. Cas. 217; The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039. Where a ticket by steamer from Dublin to Whitehaven contained on its face only the words, "Dublin to Whitehaven," it was held that the purchaser was not bound by conditions on the back of the ticket, which he had not seen, since the ticket was a complete contract on its face. Henderson v. Stevenson, L. R. 2 H. L. 470.

On the other hand, where a ticket had written on its face the words, "Subject to the conditions on the other side," and the person to whom it was issued admitted knowledge that there were conditions, but said he had not read them, the conditions contained on the back were held binding notwithstanding they were not read. Harris v. Railway Co., 1 Q. B. Div. 515.

In another case the ticket contained on its face the words, "See back," and the person to whom it was given admitted knowledge of writing on the ticket, but denied all knowledge that the writing contained conditions. It was held that he was bound by the conditions if the jury were of opinion that the ticket amounted to a reasonable notice of their existence. Parker v. Southeastern Ry. Co., supra. *See "Carriers," Dec. Dig. (Key-No.) §§ 62, 153; Cent. Dig. §§ 195–206½, 687–690.*

[28] Burke v. Railway Co., 5 C. P. Div. 1; Watkins v. Rymill, 10 Q. B. Div. 178; McClure v. Railroad Co., 34 Md. 532, 6 Am. Rep. 345; Johnson v. Same, 63 Md. 106; Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; Durgin v. Express Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Davis v. Railroad Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; Schaller v. Railway Co., 97 Wis. 31, 71 N. W. 1042. But some-

effect until communicated. There can be no contract without mutual assent; and how may a party assent to that which has never been communicated to him?[29]

NECESSITY AND EFFECT OF ACCEPTANCE

17. An offer before it will become a binding promise must be accepted.

It is the universal rule that an offer must be accepted before it will become a binding promise, and result in a contract.[30] This rule springs from the very nature of contract as involving the element of agreement.[31] An unaccepted offer, therefore, cannot create any rights, or bind the party making it to the party to whom it is made. A fortiori, it cannot bind the party to whom

courts hold that, where a contract limiting the common-law liability of the carrier is contained in a bill of lading, the burden is on the carrier to show that the limitations were assented to. See Michigan Cent. R. v. Manufacturing Co., 16 Wall. 318, 21 L. Ed. 297; 9 Cyc. Law & Proc. 263. One who accepts a document reasonably purporting to be a mere check or voucher, and not a contract, without knowledge of stipulations contained in it, does not assent to such stipulations. Malone v. Railroad Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598. See Fonseca v. Steamship Co., supra. *See "Carriers," Dec. Dig. (Key-No.) §§ 62, 153; Cent. Dig. §§ 195–206½, 687–690.*

[29] As to whether an offer under seal, which has been communicated, may be revoked, see post, 40.

[30] PRESCOTT v. JONES, 69 N. H. 305, 41 Atl. 352, Throckmorton Cas. Contracts, 10 [cit. Clark on Contracts]; Payne v. Cave, 3 Term R. 148; Tuttle v. Love, 7 Johns. (N. Y.) 470; Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; First Nat. Bank v. Hall, 101 U. S. 43, 25 L. Ed. 822; McKinley v. Watkins, 13 Ill. 140; Bruce v. Bishop, 43 Vt. 161; Weiden v. Woodruff, 38 Mich. 130; Brown v. Rice, 29 Mo. 322; Belfast & M. L. R. Co. v. Inhabitants of Unity, 62 Me. 148; Bower v. Blessing, 8 Serg. & R. (Pa.) 243; King v. Warfield, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384; Missouri Pac. Ry. Co. v. Railway Co. (C. C.) 31 Fed. 864; Etheredge v. Barkley, 25 Fla. 814, 6 South. 861; Hodges v. Sublett, 91 Ala. 588, 8 South. 800; Graff v. Buchanan, 46 Minn. 254, 48 N. W. 915; Bronson v. Herbert, 95 Mich. 478, 55 N. W. 359; McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; State v. Board of Public Service of Columbus, 81 Ohio St. 218, 90 N. E. 389; Wm. J. Lemp Brewing Co. v. Secor, 21 Okl. 537, 96 Pac. 636. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 71–92.*

[31] Ante, p. 3. Suppose A. makes an offer by letter to B. to sell him certain goods at a certain price, and B., not knowing of the offer, makes an offer by letter to A. to buy the goods at that price, and the letters cross each other. This is not sufficient to constitute a contract, for there is no acceptance by either of the other's offer, though it may be said that the minds of the parties are ad idem. See Tinn v. Hoffman, 29 L. T. (N. S.) 271. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 71–92.*

it is made.[82] "A contract," it has been said by Pothier, "includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made. Pollicitatio est solius offerentis promissum. A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an obligation; and the person who has made the promise may retract it any time before it is accepted; for there cannot be any obligation without a right being acquired by the person in whose favor it is contracted against the party bound. Now, as I cannot, by the mere act of my own mind, transfer to another a right in my goods, without an intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right." [83]

An offer, as we shall presently see, can be revoked at any time before acceptance. Acceptance, whether by words or by conduct, supplies the element of agreement, which binds the party making it to a fulfillment of its terms.[84] It changes the character of the offer, and makes it a promise.[85]

[82] Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; Melchers v. Springs, 33 S. C. 279, 11 S. E. 788. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 71–92.*

[83] Poth. Obl. p. 1, c. 1, § 1, art. 2.

[84] Harris' Case, L. R. 7 Ch. App. 587; Thruston v. Thornton, 1 Cush. (Mass.) 91; Bowen v. Tipton, 64 Md. 275, 289, 1 Atl. 861; Equitable Endowment Ass'n v. Fisher, 71 Md. 430, 18 Atl. 808; Fried v. Insurance Co., 50 N. Y. 243; White v. Baxter, 71 N. Y. 254; Hamilton v. Insurance Co., 5 Pa. 339; Wheeler v. Railroad Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341; Hawkinson v. Harmon, 69 Wis. 551, 35 N. W. 28; Wilcox v. Cline, 70 Mich. 517, 38 N. W. 555; Merchant v. O'Rourke, 111 Iowa, 351, 82 N. W. 759. A bid at an auction sale is accepted when the hammer is struck down, and the contract is then complete. Payne v. Cave, 3 Term R. 148; Blossom v. Railway Co., 3 Wall. 196, 18 L. Ed. 43; Ives v. Tregent, 29 Mich. 390. Where an offer is made containing conditions, an acceptance without qualification is an acceptance of the conditions, and makes a binding contract. Lawrence v. Railway Co., 84 Wis. 427, 54 N. W. 797. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[85] See Gartner v. Hand, 86 Ga. 558, 12 S. E. 878. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

COMMUNICATION OF ACCEPTANCE

18. Where the offer contemplates the performance of or forbearance from an act as the consideration of the promise of the offeror, the performance or forbearance is an acceptance, unless the offeror expressly or impliedly prescribes that the acceptance must be communicated.

19. Where the offer contemplates a promise as the consideration of the promise of the offeror, communication of the acceptance is essential, unless the offer contemplates that the performance of some overt act manifesting an intention to accept shall be an acceptance, in which case performance of the act is an acceptance.

20. Where the offer contemplates the dispatch of an acceptance by means beyond the acceptor's control, as by post, telegraph, or the offeror's messenger, an acceptance so dispatched is effective from the time of dispatch, unless the offeror makes the formation of the contract dependent upon actual communication to himself.

It is frequently said that it is essential to the formation of a contract that the acceptance be communicated, but, as already intimated, such is far from being the fact. It is, indeed, true that acceptance must be more than mere mental assent.[86] Where,

[86] WHITE v. CORLIES, 46 N. Y. 467, Throckmorton Cas. Contracts, 1; Felthouse v. Bindley, 11 C. B. (N. S.) 869; Hebb's Case, L. R. 4 Eq. 9; Brogden v. Railway Co., L. R. 2 App. Cas. 691; Stitt v. Huidekoper, 17 Wall. 385, 21 L. Ed. 644; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Van Valkenburg v. Rogers, 18 Mich. 180; Strasburg R. Co. v. Echternacht, 21 Pa. 220, 60 Am. Dec. 49; Ueberroth v. Riegel, 71 Pa. 280; Beckwith v. Cheever, 21 N. H. 41; Trounstine v. Sellers, 35 Kan. 447, 11 Pac. 441; Gilman v. Kibler, 5 Humph. (Tenn.) 19; Stuart v. Railroad Co., 32 Grat. (Va.) 146; Johnson v. Jacobs, 42 Minn. 168, 44 N. W. 6; Cozart v. Herndon, 114 N. C. 252, 19 S. E. 158.

In Lancaster v. Elliott, 28 Mo. App. 86, it was held that a proposal by defendant to relinquish certain rights against plaintiff was not accepted by writing on the proposal the word "Accepted," and depositing in bank a sum of money to be applied as required by the proposal, where both the proposal and the deposit remained under plaintiff's control.

Where an order for goods is given to an agent of the manufacturer, a letter from the latter to the agent, without any notice to the person who gave the order, is not an acceptance, so as to render the order binding. Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897. And so an application for an insurance policy, given to an agent of the company and by him forwarded to the company, and the issuance and transmission of the policy to the agent, does not establish a contract of insurance without communication of acceptance

for instance, a person by letter offered to buy another's horse for a certain price, adding, "If I hear no more about him, I consider the horse is mine at" that price, and no answer was returned, it was held that there was no contract, and this, though it appeared that the person to whom the offer was sent had made up his mind to accept, and had stated to a third person that the horse was sold.[37] A person making an offer may indicate some overt act the performance of which shall be a sufficient manifestation of acceptance, but the statement to a third person that the horse was sold was not such an act, and the silent assent of the offeree was not an acceptance.

Offer of Promise for Act

Whether or not communication of the acceptance is essential to the formation of a contract must depend upon the nature and terms of the offer; that is, upon whether the offeror proposes to be bound upon the performance of an act by the offeree, or upon his communication of his acceptance of the offer. "Where a person in an offer made by himself to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person * * * to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the consideration is a sufficient acceptance without notification."[38] If the offer contemplates the doing or forbearance from the doing of an act as the consideration of the promise of the offeror, unless the offer prescribes communication, the mere performance of the consideration completes the contract.[39] Thus, if a person orders goods of a merchant, who ships them pursuant to the order, the

to the applicant. Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[37] Felthouse v. Bindley, supra. See, also, to the same effect, PRESCOTT v. JONES, 69 N. H. 305, 41 Atl. 352, Throckmorton Cas. Contracts, 10 [cit. Clark on Contracts]. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[38] Carlill v. Smoke-Ball Co. (1893) 1 Q. B. 256. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[39] Brogden v. Railway Co., L. R. 2 App. Cas. 691; First Nat. Bank v. Watkins, 154 Mass. 385, 28 N. E. 275; Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644. While a party making an offer may specify how it shall be accepted, in order to complete the contract, yet, if he does not so specify, anything which in law would be an acceptance is sufficient. Mott v. Jackson, 172 Ala. 448, 55 South. 528. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 32–92, 104–108.*

contract of sale is complete upon the shipment;[40] and if a person offers a reward for the return of lost articles, or for information, the contract is complete upon transmission of the articles or the information to the offeror.[41] So, as we have seen, if a person asks another to work for him, unless a particular form of acceptance is prescribed, the latter may accept the offer simply by performing the service;[42] and if a person sends goods to another, who uses them, he is liable to pay for them.[43] Yet, even where the offer is of a promise for an act, the offeror may, of course, make communication of acceptance a condition of the formation of a contract.

Offer to Guaranty Future Advances

An apparent exception to the rule that performance of the act without notification of acceptance completes the contract is found in the cases which hold that an offer to guaranty future advances to be made or credit to be extended to a third person, and the like, does not ripen into a contract upon the making of the advances or extending the credit, but that notice of acceptance by the guarantee is essential.[44] These cases have been put upon the untenable ground that the acceptance of the offeree must be signified to the offeror to make a binding contract, and also upon the ground that the requirement of notice is reasonable, as enabling the guarantor to know the nature and extent of his liability, to guard himself against losses which might otherwise be unknown to him, and to avail himself of appropriate means to compel the other parties to discharge him from future liabilities.[45] The doctrine is recognized as an exception to the rule governing ordinary contracts and is said to be implied in contracts of guaranty either by reason of the custom of merchants or by the inherent nature

[40] Finch v. Mansfield, 97 Mass. 89; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017; Kelsea v. Manufacturing Co., 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; Boit v. Maybin, 52 Ala. 252; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624. See Brogden v. Railway Co., 2 App. Cas. 666. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[41] Post, p. 47. [42] Ante, p. 18. [43] Ante, p. 19.

[44] Edmondston v. Drake, 5 Pet. (U. S.) 624, 8 L. Ed. 251; Adams, Cunningham & Co. v. Jones, 12 Pet. 207, 9 L. Ed. 1058; Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686; Davis Sewing Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480; Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205, 80 Am. St. Rep. 832; De Cremer v. Anderson, 113 Mich. 578, 71 N. W. 1090; German Sav. Bank v. Roofing Co., 112 Iowa, 184, 83 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 335 (full citation of cases). *See "Guaranty," Dec. Dig. (Key-No.) §§ 6, 7; Cent. Dig. §§ 8, 9.*

[45] Davis v. Wells, supra. *See "Guaranty," Dec. Dig. (Key-No.) §§ 6, 7; Cent. Dig. §§ 8, 9.*

of the transaction.[46] Even where applied, however, it is subject to certain limitations.[47] And it is wholly rejected in England [48] and in certain jurisdictions in this country,[49] in which it is held that performance of the act, such as an advance of money, which was to constitute the consideration for the promise, is a sufficient acceptance of the offer.[50]

Offer of Promise for a Promise

On the other hand, where the offer contemplates a promise as the consideration of the promise of the offeror, it is obvious that words or conduct upon the part of the offeree indicating to the former an agreement to be bound is essential, or at least that the offeree must indicate his intention to be bound by some overt act, not necessarily an act brought to the knowledge of the offeror, but an act which, from the nature and terms of the offer, must have been contemplated by the offeror as an acceptance. Thus, where the defendants wrote to the plaintiff, who had furnished an estimate for fitting up their offices, "Upon an agreement to finish the fitting up * * * in two weeks from date, you can begin at once," but countermanded the offer after the plaintiff had bought lumber and begun work thereon, it was held error to charge the jury that the plaintiff need not indicate to the defendants his acceptance of their offer and that the purchase of the stuff and working on it after receiving the note made

[46] Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437. See, also, Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644. *See "Guaranty," Dec. Dig. (Key-No.) §§ 6, 7; Cent. Dig. §§ 8, 9.*

[47] Davis v. Wells, ante. *See "Guaranty," Dec. Dig. (Key-No.) §§ 6, 7; Cent. Dig. §§ 8, 9.*

[48] 15 Halsbury's Laws of Eng. 449. And see Pope v. Andrews, 9 Car. & P. 564; Morrell v. Cowan, 7 Ch. D. 151. *See "Guaranty," Dec. Dig. (Key-No.) §§ 6, 7; Cent. Dig. §§ 8, 9.*

[49] Wilcox v. Draper, 12 Neb. 138, 10 N. W. 579, 41 Am. Rep. 763; Lininger & Metcalf Co. v. Wheat, 49 Neb. 567, 68 N. W. 941; Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504; Crittenden v. Fiske, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; Powers v. Bumcratz, 12 Ohio St. 273; (cf. Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218); Douglass v. Howland, 24 Wend. (N. Y.) 35; Union Bank v. Coster's Ex'rs, 3 N. Y. 203, 53 Am. Dec. 280; Caton v. Shaw, 2 Har. & G. (Md.) 13; Bright v. McKnight, 1 Sneed (Tenn.) 158; 2 Am. Lead. Cas. 106 et seq. See, also, Manry v. Waxelbaum Co., 108 Ga. 14, 33 S. E. 701. *See "Guaranty," Dec. Dig. (Key-No.) §§ 6, 7; Cent. Dig. §§ 8, 9.*

[50] For full discussion, see 5 Col. L. Rev. 215, article by W. P. Rogers, in which it is said: "An examination of the cases below convinces one that the rule requiring notice when the debt is future, as announced by the Supreme Court of the United States, is losing its hold, at least in the states from which these cases are cited"—citing cases from Ohio, New York, Iowa, Virginia, Indiana, Kansas, Michigan, and New Hampshire.

a binding contract.[51] The offer contemplated the plaintiff's promise or agreement to finish in two weeks as an acceptance, and there was nothing in his conduct that indicated to the defendants his agreement to perform. The offeror may, however, indicate some act by which the offeree may manifest his intention to be bound, the performance of which, without actual communication, shall be sufficient as an acceptance, and when the offeree has thus indicated his intention the contract is complete. It seems that the rule which prevails in regard to contracts by correspondence must rest upon this ground.[52]

Contract by Correspondence

It is now settled that the acceptance in case of contract by correspondence where an answer is invited by post is complete as soon as the letter of acceptance is dispatched.[53] Where an

[51] WHITE v. CORLIES, 46 N. Y. 467, Throckmorton Cas. Contracts, 1. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[52] "I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request, expressed or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound. If a man sent an offer abroad saying, 'I wish to know whether you will supply me with goods at such and such a price, and if you agree to that you must ship the first cargo as soon as you get this letter,' there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea it would go to the bottom of the sea at the risk of the orderer. So, again, where, as in the case of Ex parte Harris, In re Imperial Land Company of Marseilles, Law Rep. 7 Ch. App. 587, a person writes a letter and says, 'I offer to take an allotment of shares,' and he expressly or impliedly says, 'If you agree with me, send an answer by the post,' there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear." Brogden v. Railway Co., 2 App. Cas. 666, 691, per Lord Blackburn. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[53] Adams v. Lindsell, 1 Barn. & Ald. 681; Potter v. Sanders, 6 Hare, 1; Levy v. Cohen, 4 Ga. 1; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Averill v. Hedge, 12 Conn. 424; Vassar v. Camp, 11 N. Y. 441; Darlington Iron Co. v. Foote (C. C.) 16 Fed. 646; Thomson v. James, 18 Dunl., B. & M. 1; MINNESOTA LINSEED OIL CO. v. LEAD CO., 4 Dill. 431, Fed. Cas. No. 9,635, Throckmorton Cas. Contracts, 24; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Harris' Case, L. R. 7 Ch. 587; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Wheat v. Cross, 31 Md. 99, 103, 1 Am. Rep. 28; Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752; Stockham v. Stockham, 32 Md. 196; Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409; Perry v. Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; Calhoun v. Atchison, 4 Bush (Ky.) 261, 96 Am. Dec. 299; Hamilton v. Insurance Co., 5 Pa. 339; Abbott v. Shepard, 48 N. H. 14; Hunt v. Higman, 70 Iowa, 406, 30 N. W. 769; Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; Cobb v. Foree, 38 Ill. App. 235; Burton v. United States, 202

offer is made by post it may be assumed that an answer by post is invited unless the contrary is indicated, but the rule is not necessarily confined to cases where the offer is made in that manner. "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as posted."[54] The rule has not been established without vigorous dissent.[55]

There was at first some hesitation in applying this rule in cases where the letter of acceptance was lost or delayed in transmission; but it is now settled by the great weight of authority that, when an acceptance has been posted, the contract is complete, and cannot be affected by the subsequent fate of the letter.[56] "The

U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362, and note; Scottish-American Mortg. Co. v. Davis (Tex. Civ. App.) 72 S. W. 217. Contra, McCulloch v. Insurance Co., 1 Pick. (Mass.) 278 (but see Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387). But communication of acceptance to the offeror's agent is not sufficient, even where it is accompanied by a direction to give notice. New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[54] Henthorn v. Fraser, [1892] 2 Ch. 27, per Lord Herschell. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[55] See dissenting opinion of Bramwell, L. J., in HOUSEHOLD INS. CO. v. GRANT, 4 Exch. Div. 221, Throckmorton Cas. Contracts, 12; British & Am. Tel. Co. v. Colson, L. R. 6 Exch. 108; McCulloch v. Insurance Co., 1 Pick. (Mass.) 278; Langdell, Sum. Cont. §§ 14, 15; Parsons, Cont. (8th Ed., Williston) *484, note 1.

There is much force in the argument that communication is essential to the counter promise which is the consideration, and that hence the acceptance cannot take effect until its receipt. Moreover, granting that the offeror must be taken to have contemplated that the post may be used as a means of communicating the acceptance, it is its communication, and not the mere putting it in course to be communicated, which he practically contemplates. It is a somewhat violent assumption to attribute to him any different intention than that which would be expressed by making the offer conditional upon receipt of the acceptance, which would be enforced. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[56] HOUSEHOLD INS. CO. v. GRANT, 4 Exch. Div. 221, Throckmorton Cas. Contracts, 12; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Washburn v. Fletcher, 42 Wis. 152; Vassar v. Camp, 11 N. Y. 441; Dunlop v. Higgins, 1 H. L. Cas. 381; Bryant v. Booze, 55 Ga. 438; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Duncan v. Topham, 8 C. B. 225; Chytraus v. Smith, 141 Ill. 231, 30 N. E. 450; College Mill Co. v. Fidler (Tenn. Ch.) 58 S. W. 382. See, contra, British & Am. Tel. Co. v. Colson, L. R. 6 Exch. 108, disapproved in Harris' Case, supra. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

acceptor," it has been said, "in posting the letter has 'put it out of his control, and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound.' How, then, can a casualty in the post, whether resulting in delay—which in commercial transactions is often as bad as no delivery—or in nondelivery, unbind the parties or unmake the contract?" [57] The rule is the same where the telegraph is properly used as the mode of signifying acceptance, and the contract is complete on delivery of the message to the telegraph company.[58] This rule, of course, does not apply where the offer expressly or by implication stipulates that the contract is to be complete, and the offer binding, when the acceptance is received. In such a case the mailing of the acceptance is not enough.[59]

To constitute an acceptance, however, the letter must be actually and properly posted. If it is delivered to an agent of the acceptor, and he neglects to mail it, or to a postman not authorized to receive letters, or if it is posted without a stamp, or improperly addressed, it is not an acceptance.[60]

In England, where the doctrine was first established that the mailing of a letter of acceptance makes the contract, a letter passes beyond the control of the sender when it is mailed; and such was formerly the case in this country. Under the present regulations of the United States Post Office Department,[61] however, the sender may, upon proper identification, reclaim the letter from the office at which it has been mailed, or even require the postmaster at such office to telegraph to the office to which it

[57] HOUSEHOLD INS. CO. v. GRANT, 4 Exch. Div. 221, Throckmorton Cas. Contracts, 12. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[58] MINNESOTA LINSEED OIL CO. v. LEAD CO., 4 Dill. 431, Fed. Cas. No. 9,635, Throckmorton Cas. Contracts, 24; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[59] Vassar v. Camp, 11 N. Y. 441; Lewis v. Browning, 130 Mass. 173; Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[60] Henderson v. Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; Maclay v. Harvey, 90 Ill. 523, 32 Am. Rep. 35; Blake v. Insurance Co., 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15; In re London & N. Bank [1900] 1 Ch. 220. Deposit of a letter in a street letter box is equivalent to deposit in the post office. Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597. "While constructive notice of acceptance is permitted to take the place of actual communication in such cases, still the law requires that the message of acceptance shall pass beyond the recall or control of the acceptor." Busher v. New York Life Ins. Co., 72 N. H. 551, 58 Atl. 41. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[61] U. S. Post Office Regulations, (1913 Ed.) §§ 552, 553.

is addressed, directing its return, if undelivered. Since, therefore, a letter does not pass beyond the control of the sender until it is delivered, a question has arisen as to whether the mere posting of the letter constitutes an irrevocable acceptance.[62] In accordance with the general rule, however, it has been held that it does, and that a contract exists from the moment of mailing the letter, notwithstanding that it is reclaimed from the mails by the sender.[63]

CHARACTER, MODE, PLACE, AND TIME OF ACCEPTANCE

21. The acceptance of an offer to result in a contract must be—
(a) Absolute and unconditional.
(b) Identical with the terms of the offer.
(c) In the mode, at the place, and within the time expressly or impliedly required by the offer.

The acceptance of an offer must be absolute, and identical with the terms of the offer; or, as it has been expressed, "an acceptance to be good must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."[64] Unless this is so, there is no meeting of minds

[62] 9 Cyc. 297. In the English case of Ex parte Cote, L. R. 9 Ch. 27, it was held that the posting of a letter in France, where it was subject to be reclaimed by the sender until its dispatch from the office of transmission, did not transfer title to certain bills of exchange inclosed. But in Canterbury v. Sparta, 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845, 51 Am. St. Rep. 870, upon a very similar state of facts, the sender was held liable to the extent of an inclosed draft, even though he had reclaimed it from the post office authorities. And see, also, McDonald v. Chemical Nat. Bank, 174 U. S. 610, 19 Sup. Ct. 787, 43 L. Ed. 1106; Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147. *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[63] Scottish-American Mortgage Co. v. Davis (Tex. Civ. App.) 72 S. W. 217 (quoting with approval the statement of Vredenburgh, J., in Hallock v. Ins. Co., 26 N. J. Law, 268, 280, that "the acceptor can no more overtake and countermand his letter mailed, than he can his words of acceptance after they have issued from his lips"). *See "Contracts," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 119, 120.*

[64] Knowlton's Anson, Cont. 22, note; ELIASON v. HENSHAW, 4 Wheat. 225, 4 L. Ed. 556, Throckmorton Cas. Contracts, 18; Potts v. Whitehead, 23 N. J. Eq. 512; Thomas v. Greenwood, 69 Mich. 215, 37 N. W. 195; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Jordan v. Norton, 4 Mees. & W. 155; Corcoran v. White, 117 Ill. 118, 7 N. E. 523, 57 Am. Rep. 858; Siebold v. Davis, 67

and expression of one and the same common intention—the intention expressed by one of the parties is either doubtful in itself, or is different from that of the other. The intention of the parties must be distinct and common to both.[65]

If a person offers to do a definite thing, and the person to whom the offer is made accepts conditionally, or introduces a new term into the acceptance, his answer is not an acceptance. It is either a mere expression of willingness to treat, or it is in effect a counter offer.[66] A proposal to accept, or an acceptance varying the terms from those offered, is a rejection of the offer, and the offer is then no longer open to acceptance.[67]

Agreement to Make Contract

If a person proposes to sell another property, and the latter accepts "subject to the terms of a contract being arranged" between their solicitors, there is no agreement, for the acceptance is not final, but subject to a discussion to take place between the agents of the parties.[68] If anything is left for future arrangement, the

Iowa, 560, 25 N. W. 778; Stagg v. Compton, 81 Ind. 171; Corser v. Hale, 149 Pa. 274, 24 Atl. 285; Wilkin Mfg. Co. v. Lumber Co., 94 Mich. 158, 53 N. W. 1045; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Scott v. Davis, 141 Mo. 213, 42 S. W. 714; Coad v. Rogers, 115 Iowa, 478, 88 N. W. 947; Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612; Shady Hill Nursery Co. v. Waterer, 179 Mass. 318, 60 N. E. 789; Marschall v. Eisen Vineyard Co., 28 N. Y. Supp. 62, 7 Misc. Rep. 674; Strong & Trowbridge Co. v. H. Baars & Co., 60 Fla. 253, 54 South. 92. See, also, the cases cited in following notes.

As to acceptance by a person other than the one to whom the offer was made, see post, p. 240. State v. Board of State Prison Com'rs, 37 Mont. 378, 96 Pac. 736; Gibney & Co. v. Arlington Brewery Co., 112 Va. 117, 70 S. E. 483. *See "Contracts," Dec. Dig. (Key-No.) § 24; Cent. Dig. §§ 100–103.*

[65] Ante, p. 8.

[66] Hough v. Brown, 19 N. Y. 111; Briggs v. Sizer, 30 N. Y. 647; Borland v. Guffy, 1 Grant, Cas. (Pa.) 394; Harlow v. Curtis, 121 Mass. 320; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Hammond v. Winchester, 82 Ala. 470, 2 South. 892; Crabtree v. Opera-House Co. (C. C.) 39 Fed. 746; Hubbell v. Palmer, 76 Mich. 441, 43 N. W. 442; Bristol Aerated Bread Co. v. Maggs, 44 Ch. Div. 616; Robertson v. Tapley, 48 Mo. App. 239; Crossley v. Maycock, 18 Eq. 180; Mygatt v. Tarbell, 85 Wis. 457, 55 N. W. 1031; Jones v. Daniel, [1894] 2 Ch. 332; Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087; Russell v. Manufacturing Co., 106 Wis. 329, 82 N. W. 134; Harris v. Scott, 67 N. H. 437, 32 Atl. 770; Putnam v. Grace, 161 Mass. 237, 37 N. E. 166.

If so accepted by the original proposer, it becomes a binding promise. Esmay v. Gorton, 18 Ill. 483. *See "Contracts," Dec. Dig. (Key-No.) § 24; Cent. Dig. §§ 100–103.*

[67] Minneapolis & St. L. Ry. Co. v. Mill Co., 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; Hyde v. Wrench, 3 Beav. 334; Virginia Hot Springs Co. v. Harrison, 93 Va. 569, 25 S. E. 888; James v. Darby, 100 Fed. 224, 40 C. C. A. 341. *See "Contracts," Dec. Dig. (Key-No.) § 24; Cent. Dig. §§ 100–103.*

[68] Honeyman v. Marryat, 6 H. L. Cas. 112. It seems that an acceptance

parties have not agreed.[69] It is not to be understood from this that there must be nothing at all to be done after the acceptance. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed;[70] but the parties must intend the agreement to be binding. If, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared and signed, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.[71]

Acceptance Varying from Offer

An offer to sell a specified quantity of goods cannot be made binding on the proposer by ordering a less quantity, for there is no offer to sell any quantity greater or less than that specified.[72] And the same is true where the offer is to sell a certain quantity each of several articles, and the person to whom the offer is made orders the specified quantity of one or more of them, but declines

of an offer to sell land, "subject to the title being approved by" the acceptor's attorneys, is not conditional. Hussey v. Horne-Payne, 4 App. Cas. 311, 8 Ch. Div. 670. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 16, 17; Cent. Dig. §§ 17–21.*

[69] Martin v. Fuel Co. (C. C.) 22 Fed. 596; Appleby v. Johnson, L. R. 9 C. P. 158; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Utley v. Donaldson, 94 U. S. 29, 24 L. Ed. 54; First Nat. Bank v. Hall, 101 U. S. 43, 25 L. Ed. 822; Brown v. N. Y. Central R. Co., 44 N. Y. 79; Canton Co. v. Railroad Co., 21 Md. 383, 396; First Nat. Bank v. Clark, 61 Md. 400, 48 Am. Rep. 114; Bruce v. Bishop, 43 Vt. 161; Sibley v. Felton, 156 Mass. 273, 31 N. E. 10; Sparks v. Pittsburgh Co., 159 Pa. 295, 28 Atl. 152; Stanley v. Dowdeswell, L. R. 10 C. P. 102; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; St. Louis & S. F. R. Co. v. Gorman, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637. And see post, p. 52. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 16, 17; Cent. Dig. §§ 17–21.*

[70] Ridgway v. Wharton, 6 H. L. Cas. 238; Bolton v. Lambert, 41 Ch. Div. 295; Bonnewell v. Jenkins, 8 Ch. Div. 70, 73; Cheney v. Transportation Line, 59 Md. 557; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; Lawrence v. Railroad Co., 84 Wis. 427, 54 N. W. 797; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 16, 17; Cent. Dig. §§ 17–21.*

[71] Ridgway v. Wharton, 6 H. L. Cas. 238; Winn v. Bull, 7 Ch. Div. 29; Wills v. Carpenter, 75 Md. 80, 25 Atl. 415; Commercial Tel. Co. v. Smith, 47 Hun (N. Y.) 494. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 16, 17; Cent. Dig. §§ 17–21.*

[72] Minneapolis & St. L. Ry. Co. v. Rolling-Mill Co., 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; Michigan Bolt & Nut Co. v. Steel, 111 Mich. 153, 69 N. W. 241. *See "Sales," Dec. Dig. (Key-No.) §§ 22–23; Cent. Dig. §§ 39–48; "Contracts," Cent. Dig. §§ 71, 75.*

the others.[73] Nor will an order of a certain quantity of goods, accepted by sending a less quantity, impose any liability for the goods sent.[74] So, also, if a person proposes to sell land to another for a certain sum, and the latter replies that he will give a less sum, there is nothing binding between the parties.[75] Again, if a person offers to sell land, saying nothing as to the place of payment, and the acceptance specifies that payment shall be made at the acceptor's place of residence, there is no contract, since, under the offer, the proposer would be entitled to payment at his place of residence.[76]

Manner, Place, and Time of Acceptance

It is also essential that the acceptance shall be made in the manner, at the place, and within the time expressly or impliedly designated in the offer. The proposer has the right to dictate terms in respect to the time, place, and manner of acceptance; and when he does so, like all other terms, they must be complied with. In a leading case on this point the defendant offered to buy flour from the plaintiffs, stating in his offer that the answer should be sent by return of the wagon which brought the offer. The plaintiffs, instead of sending their acceptance by the wagon, mailed it to the defendant at a place other than the destination of the wagon, where it was duly received by him. It was held, however, that he was not bound by the acceptance, as it was not sent to the place prescribed.[77] If an offer asks that the answer be sent by the messenger who brings the offer, or by mail, or by telegraph, it must be

[73] Thomas v. Greenwood, 69 Mich. 215, 37 N. W. 195. *See "Sales," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 39–48; "Contracts," Cent. Dig. §§ 71, 75.*

[74] Bruce v. Pearson, 8 Johns. (N. Y.) 534. As to implied contract from retaining and using or consuming the goods so sent, see ante, p. 19, and note 7. *See "Sales," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 39–48; "Contracts," Cent. Dig. §§ 71, 75.*

[75] Hyde v. Wrench, 3 Beav. 336. And see post, p. 20, and cases cited. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 16, 17; Cent. Dig. §§ 17–21.*

[76] Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Sawyer v. Brossart, 67 Iowa, 678, 25 N. W. 876, 5 Am. Rep. 371; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690; Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Maynard v. Tabor, 53 Me. 511. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 16, 17; Cent. Dig. §§ 17–21.*

[77] ELIASON v. HENSHAW, 4 Wheat. 225, 4 L. Ed. 556, Throckmorton Cas. Contracts, 18. Where a person residing in one state makes a written offer to a person residing in another, and at a distance, to sell lands, without arranging for a personal meeting, an acceptance by mail is authorized. Wilcox v. Cline, 70 Mich. 517, 38 N. W. 555. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

so sent, to be effective.[78] An answer by mail is insufficient if the telegraph is the mode prescribed.[79] An offer by mail, which says nothing as to the mode of sending the answer, impliedly requires an answer by mail, or possibly authorizes one by telegraph,[80] though an acceptance sent by any other mode, and reaching the proposer within a reasonable time, might be held sufficient.[81] An offer by telegraph impliedly requires an answer by telegraph, and an answer by mail will not be sufficient.

If the offer specifies a time for acceptance, it is a term of the offer, and an acceptance after the specified time will have no effect.[82] An offer by correspondence, for instance, calling for an answer "in course of post," or "by return mail," must be accepted by return mail.[83] It may safely be said that any substantial delay will be fatal, even where an answer by "return mail" is not requested. An acceptance sent three or four days after the receipt of the offer has been held too late, and there seems no reason to doubt that a delay of one day would be equally fatal.[84] If no time

[78] Carr v. Duval, 14 Pet. 83, 10 L. Ed. 361. Putting a letter of acceptance in the private letter box of the proposer has been held sufficient. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285. As to what constitutes mailing a letter, see ante, p. 33, note 60. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[79] Horne v. Niver, 168 Mass. 4, 46 N. E. 393. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[80] Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Vassar v. Camp, 11 N. Y. 441; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Wilcox v. Cline, 70 Mich. 517, 38 N. W. 555; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[81] Trounstine v. Sellers, 35 Kan. 447, 11 Pac. 441. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92, 104–108.*

[82] Longworth v. Mitchell, 26 Ohio St. 334; Potts v. Whitehead, 20 N. J. Eq. 55; Britton v. Phillips, 24 How. Prac. (N. Y.) 111; Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; Union Nat. Bank v. Miller, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Cummings v. Realty Co., 86 Wis. 382, 57 N. W. 43. And see Park v. Whitney, 148 Mass. 278, 19 N. E. 161. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[83] Dunlop v. Higgins, 1 H. L. Cas. 387; Carr v. Duval, 14 Pet. 83, 10 L. Ed. 361; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Averill v. Hedge, 12 Conn. 424; Tinn v. Hoffman, 29 Law T. (N. S.) 271. Cf. Palmer v. Insurance Co., 84 N. Y. 63. If the delivery of a letter containing an offer is delayed through the sender's fault, or, it may no doubt be, without the fault of either party, an acceptance as soon as the letter is received is in time. It is by return mail. See Leake, Cont. 18; Adams v. Lindsell, 1 Barn. & Ald. 681. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[84] Taylor v. Rennie, 35 Barb. (N. Y.) 272; MINNESOTA LINSEED OIL CO. v. LEAD CO., 4 Dill. 435, Fed. Cas. No. 9,635, Throckmorton Cas. Contracts, 24; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Ortman v. Weaver (C. C.)

for acceptance is specified, then a reasonable time is implied.[85] What is a reasonable time must necessarily depend on the nature of the offer and the circumstances of each particular case.

REVOCATION OF OFFER

22. Until the moment of acceptance, an offer may be revoked, and a subsequent acceptance will be inoperative, except that—

EXCEPTION—Where the party making the offer has contracted under seal or for a consideration to hold it open for a certain time, he may not revoke it within such time.

23. Notice of revocation must be communicated, to prevent an acceptance from being effective.

Since an offer, unaccepted, creates no rights, it follows that it may be revoked at any time before acceptance.[86] An order, for instance, given to the agent of the party to whom it is made, who has no authority to accept it, is revocable at any time before his principal accepts it; and it is immaterial that the order recites that it is taken with the understanding that it is positive, and not subject to

11 Fed. 358; Dunlop v. Higgins, 1 H. L. Cas. 387. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[85] Ramsgate Hotel Co. v. Montefiore, L. R. 1 Exch. 109; MINNESOTA LINSEED OIL CO. v. LEAD CO., 4 Dill. 431, Fed. Cas. No. 9,635, Throckmorton Cas. Contracts, § 24; Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752; Averill v. Hedge, 12 Conn. 424; Trounstine v. Sellers, 35 Kan. 447, 11 Pac. 441; McCracken v. Harned, 66 N. J. Law, 37, 48 Atl. 513; Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Lehigh Valley Coal Co. v. Curtis, 22 Ill. App. 394; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; Stone v. Harmon, 31 Minn. 512, 19 N. W. 88; Omaha Loan & Trust Co. v. Goodman, 62 Neb. 197, 86 N. W. 1082. This has been held to apply to offers of a reward to the public generally by way of advertisement. Loring v. City of Boston, 7 Metc. (Mass.) 409. But see post, p. 49, note 22. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[86] IDE v. LEISER, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17, Throckmorton Cas. Contracts, 20; Payne v. Cave, 3 Term R. 148; Offord v. Davies, 12 C. B. (N. S.) 748; Countess of Dunmore v. Alexander, 9 Shaw, D. & B. 190; Quick v. Wheeler, 78 N. Y. 300; Houghwout v. Boisaubin, 18 N. J. Eq. 315; Schenectady Stove Co. v. Holbrook, 101 N. Y. 45, 4 N. E. 4; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Boston & M. R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Weiden v. Woodruff, 38 Mich. 130; Larmon v. Jordan, 56 Ill. 204; Crocker v. Railroad Co., 24 Conn. 249; Martin v. Hudson, 81 Cal. 42, 22 Pac. 292; Miller v. Douville, 45 La. Ann. 214, 12 South. 132; Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Tucker v. Lawrence, 56 Vt. 467; Benton v. Association, 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep.

change or countermand.[87] Where an offer is made to several persons, it must be accepted by all before it becomes binding on the proposer, for an acceptance by less than all is not a compliance with the terms of the offer; and it follows that such an offer may be revoked at any time before it is accepted by all.[88]

Offer Under Seal

It has been said that an offer under seal may not be revoked at common law.[89] This view, however, is due to a misconception of certain English cases,[90] which hold that a deed or contract under seal is binding upon a party from the time it is executed by him with intent to give it effect, although it has not been delivered or communicated to the other party; and being a valid obligation from the time of its execution, it may not be revoked. Such a deed, however, is not a mere offer to become bound, but itself imposes an obligation. The correct doctrine is that an offer under seal, as in the case of offers generally, may be revoked at any time before acceptance.[91] Where, however, an offer is accompanied by an agreement under seal to leave it open for a certain length of time, it constitutes an option or refusal, the rules in regard to which are stated below.

Agreement to Hold Offer Open—"Refusals" and "Options"

An offer, though coupled with a promise to hold it open for acceptance for a specified time, may nevertheless be revoked or withdrawn before the time has expired, provided it is not under seal and there is no consideration for the promise to hold the offer open.[92]

320. The addition of a new term to an offer is a revocation of that offer. Travis v. Insurance Co., 104 Fed. 486, 43 C. C. A. 653. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[87] National Refining Co. v. Miller, 1 S. D. 548, 47 N. W. 962. And see Challenge Wind & Feed Mill Co. v. Kerr, 93 Mich. 328, 53 N. W. 555; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[88] Burton v. Shotwell, 13 Bush (Ky.) 271. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[89] Anson, Cont. (8th Ed.) 32.

[90] Xenos v. Wickham, L. R. 2 H. L. 296; Doe d. Garnons, 5 B. & C. 671, 29 Rev. Rep. 355; Butler & Baker's Case, 3 Coke, 26b. See, also, Roberts v. Security Co., [1897] 1 Q. B. 111. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[91] See preface 29 Rev. Rep. v–ix (Sir Frederick Pollock); 16 Yale L. J. 155; Ashley, Cont. 254 et seq.

[92] IDE v. LEISER, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17, Throckmorton Cas. Contracts, 20; Cooke v. Oxley, 3 Term R. 653 (as to this case, see post, p. 43, note 1); Routledge v. Grant, 4 Bing. 653; Head v. Diggon, 3 Man. & R. 97; Stevenson v. McLean, 5 Q. B. Div. 351; Dickinson v. Dodds, 2 Ch. Div. 463; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Stensgaard

Cases of this kind arise where a person gives another the "refusal" of land or goods for a certain time, or an option to buy. If the promise to keep an offer open for a specified time is under seal, or is supported by a valuable consideration—as where money is paid or promised for the option or refusal—the promise constitutes a contract in itself, and, of course, is binding.[93] A failure to keep such an offer open constitutes a breach of contract for which an action for damages will lie. As to whether the offeree may become entitled to specific performance of the contract of sale by acceptance after the offer has been withdrawn, in violation of the contract to keep it open, there is a conflict of authority. Some courts hold that, although the act of revocation itself constitutes a breach of contract, there can be no acceptance of an offer that has in fact been revoked, and therefore there is no subsisting contract of sale which may be enforced.[94] Other cases, however, representing the weight of authority, regard the option, where it is under seal or supported by a consideration, as a contract to sell or convey upon condition, and therefore as entitling the offeree to specific performance upon compliance with the condition, as by notice of acceptance of the offer to sell within the time stipulated in the option.[95]

v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Larmon v. Jordan, 56 Ill. 206; Welden v. Woodruff, 38 Mich. 130; Klee v. Grant, 4 Misc. Rep. 88, 23 N. Y. Supp. 855; Connor v. Renneker, 25 S. C. 514; Sault Ste. M., L. & I. Co. v. Simons (C. C.) 41 Fed. 835; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Brown v. Savings Union, 134 Cal. 448, 66 Pac. 592; Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; post, p. 148. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[93] WATKINS v. ROBERTSON, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, Throckmorton Cas. Contracts, 43 [quot. Clark on Contracts, (2d Ed.) 33]; Grabenhorst v. Nicodemus, 42 Md. 236; Stitt v. Huidekoper, 17 Wall. 384, 21 L. Ed. 644; Bradford v. Foster, 87 Tenn. 4, 9 S. W. 195; Chadsey v. Condley, 62 Kan. 853, 62 Pac. 663. *See "Sales," Dec. Dig. (Key-No.) §§ 24, 25; Cent. Dig. §§ 49–52; "Specific Performance," Dec. Dig. (Key-No.) § 57; Cent. Dig. § 178; "Vendor and Purchaser," Dec. Dig. (Key-No.) § 18; Cent. Dig. § 23.*

[94] See Litz v. Goosling, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127; Graybill v. Brugh, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894. *See "Specific Performance," Dec. Dig. (Key-No.) § 57; Cent. Dig. § 178.*

[95] WATKINS v. ROBERTSON, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, Throckmorton Cas. Contracts, 43 [overruling Graybill v. Brugh, supra]; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501; O'Brien v. Bolond, 166 Mass. 481, 44 N. E. 602; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544; McMillan v. Ames, 33 Minn. 257, 22 N. W. 612; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; 9 Cyc. Law & Proc. 287; Zimmerman v. Brown (N. J. Ch.) 36 Atl. 675; Chadsey v. Condley,

Communication of Revocation—Necessity of

Revocation must be communicated, or at least brought to the knowledge of the offeree, to have any effect. As we have seen, an acceptance may take effect at the moment it is dispatched. A revocation, on the contrary, is not effective until the moment it is received. A person, therefore, who has accepted an offer not known by him to have been revoked, may safely act on the footing that the offer and acceptance constitute a contract binding on both parties. A person who has received an offer by post or telegraph, and posted or telegraphed his acceptance, has thereby created a binding contract, though notice of revocation of the offer has been mailed or wired to him before his acceptance.[96] The law, it is said, regards the proposer as making his offer during every instant of time that his letter is traveling, and during the period that may be considered as a reasonable time for acceptance. The party to whom the offer is made is therefore entitled to consider that it is still being made, unless he has notice to the contrary, and that his acceptance concludes a binding contract. The revocation cannot be held to be communicated merely because it has been put in the course of transmission. If, after an offer has been posted, or sent by any other means, the proposer sends a withdrawal by such means that it reaches the person to whom the offer was sent at the same time as the offer, this is a good revocation, and an acceptance of the offer will be ineffectual.[97]

Same—Sufficiency of

There has been some difficulty in cases in which the offeror has done some act indicating an intention to retract, as by a sale of

62 Kan. 853, 62 Pac. 663; Bradford v. Foster, 87 Tenn. 4, 9 S. W. 195. *See "Specific Performance," Dec. Dig. (Key-No.) § 57; Cent. Dig. § 178.*

[96] Byrne v. Tienhoven, 5 C. P. Div. 349; Henthorn v. Frazer [1892] 66 L. T. (N. S.) 439, 2 Ch. 27; Harris' Case, L. R. 7 Ch. App. 587; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790; Hamilton v. Insurance Co., 5 Pa. 342; Lungstrass v. Insurance Co., 48 Mo. 201, 8 Am. Rep. 100; Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Hallock v. Insurance Co., 26 N. J. Law, 268; Faulkner v. Hebard, 26 Vt. 452; McCotter v. City of New York, 37 N. Y. 325; Weiden v. Woodruff, 38 Mich. 130; Crocker v. Railroad Co., 24 Conn. 249; Cobb v. Foree, 38 Ill. App. 255; Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; Wester v. Casein Co. of America, 140 App. Div. 442, 125 N. Y. Supp. 335. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[97] Dunmore v. Alexander, 9 Shaw & D. 190. Suppose, however, the letter containing the offer should be read, and an acceptance dispatched in good faith, before the letter containing the withdrawal is opened. It would seem, on principle, that in such a case the acceptance must be effectual. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 22; Cent. Dig. §§ 57–60, 104–108.*

property offered, putting it out of his power to perform, but without communicating his revocation. It is probably settled that any overt act clearly showing an intention to revoke is enough, provided the person to whom the offer was made has notice of such act before he accepts. The revocation need not be communicated, but it is sufficient if he has knowledge of acts clearly indicating an intention to revoke.[88] It is not clearly settled what would be sufficient notice. It might probably be said that the notice must be such as reasonably amounts to knowledge of acts inconsistent with the continuance of the offer. In case of an offer to sell specific property, actual knowledge of its sale to another would clearly show an intent to revoke, but it is doubtful whether information from a stranger that such a sale has been made, or that the proposer has changed his mind, would be sufficient, as it would scarcely be reasonable to require a man to believe and act on such statements. In the absence of sufficient notice or knowledge of a revocation, the offer, according to the better doctrine and the weight of authority, continues open and will be turned into a binding promise by its acceptance.[89] Some courts, however, seem to have held, contrary to reason and principle, that notice of withdrawal is not necessary.[1] Where the parties are dealing with each other at

[88] Dickinson v. Dodds, 2 Ch. Div. 463; Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[89] Boston & M. R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224, 225; Great Northern R. Co. v. Witham, L. R. 9 C. P. 16; Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Houghwout v. Boisaubin, 18 N. J. Eq. 318; Henthorn v. Frazer [1892] 66 L. T. (N. S.) 439, 2 Ch. 27; Cheney v. Cook, 7 Wis. 413; School Directors v. Trefethren, 10 Ill. App. 127; Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464; Wall v. Railroad Co., 86 Wis. 48, 56 N. W. 367. And see Dambmann v. Lorentz, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364. See, also, post, p. 148. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 22; Cent. Dig. §§ 57–60, 104–108.*

[1] Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Gillespie v. Edmonston, 11 Humph. (Tenn.) 553. And see Cooke v. Oxley, 3 Term R. 653. This case has been very much criticised and disapproved in so far as it seems to hold that, where an offer gives a specified time within which it may be accepted, an acceptance within that time, without notice that the offer has been revoked, does not bind; that is to say, that notice of the revocation is not necessary. If the case was intended to go this far, it is not considered as authority in this country. Boston & M. R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224. Nor, it seems, is it followed, even in England, to such an extent as we have suggested. Indeed, a later English case says: "All that Cooke v. Oxley affirms is that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. * * * The offer may be revoked before acceptance. If the offer is not retracted, it is in force as a continuing offer till the time of accepting or rejecting it has arrived." Stevenson v. McLean,

a distance by correspondence, it is the settled law, in these as in other cases, that the offer continues open until notice of its withdrawal is not only sent, but received by the party to whom it was made, and is turned into a binding promise if accepted before receipt of the notice.[2] Knowledge in these cases also may be equivalent to notice sent and received.

The case of an offer made to the public generally by publication stands on a different footing from an offer made directly to a definite person. Such an offer may be revoked in the manner in which it was made.[3]

LAPSE OF OFFER

24. An offer will lapse, and so be determined without express revocation, so that a subsequent acceptance will have no effect—

(a) On the efflux of a time specified for acceptance, or of a reasonable time where no time is specified;

(b) On its rejection;

(c) On failure of the acceptance to comply with the terms of the offer, which is equivalent to rejection;

(d) On the death or insanity of either party before acceptance.

Efflux of Time

An offer may lapse and be determined by the efflux of a specified time for acceptance. If a person should offer to sell goods "if the offer is accepted by" a certain day, an acceptance after that time would have no effect. After the specified time has passed without acceptance, the offer lapses, or is determined without any further action on the part of the proposer, and it is no longer open for ac-

5 Q. B. Div. 351. If the case of Cooke v. Oxley merely decides that an offer, coupled with a promise to keep it open for a specified time, may be revoked, to the knowledge of the other party, before the time has expired, where there is no consideration for the promise to keep it open, it is in accord with the law in this country, and with the later decisions in England. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 22; Cent. Dig. §§ 57–60, 104–108.*

[2] Hamilton v. Insurance Co., 5 Pa. 339; Larmon v. Jordan, 56 Ill. 204; Averill v. Hedge, 12 Conn. 434; Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409; ante, pp. 31–34. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 22; Cent. Dig. §§ 82–92, 104–108.*

[3] Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60; "Rewards," Dec. Dig. (Key-No.) §§ 3–7; Cent. Dig. §§ 3–7.*

ceptance.[4] If no time is specified, the offer is determined by the lapse of a reasonable time.[5]

Rejection

The rejection or refusal of an offer by the person to whom it is made causes the offer to lapse. In order that an acceptance may be effective after a refusal, the offer must have been renewed by the proposer.[6]

So, also, a failure to comply with a condition of the offer as to the mode of acceptance, or an acceptance conditionally, or on terms varying from those offered, will cause the offer to lapse, for this is, in effect, a rejection of the offer.[7] Thus, where a person offered to sell land at a certain sum, and the person to whom the offer was made replied that he would give a less sum, and afterwards, when this was refused, and when the proposer was no longer willing to adhere to his original proposal, sought to bind him by accepting at the sum first asked, it was held that the proposal to buy at a less sum than asked was a refusal of the offer, and a counter proposal, and that the original offer could not, after that, he turned into a promise by acceptance.[8]

[4] Ante, p. 38, and cases cited in notes 82–84.

[5] MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO., 4 Dill. 431, 17 Fed. Cas. No. 9,635, Throckmorton Cas. Contracts, 24; Ramsgate Hotel Co. v. Montefiore, 1 Exch. 109; Loring v. City of Boston, 7 Metc. (Mass.) 409; ante, p. 39, and cases cited in note 85. Continuing offer. Sherley v. Peehl, 84 Wis. 46, 54 N. W. 267. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[6] Tinn v. Hoffman, 29 Law T. (N. S.) 271; Hyde v. Wrench, 3 Beav. 334; Davis v. Parish, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287; W. & H. M. Goulding v. Hammond, 4 C. C. A. 533, 54 Fed. 639; Sheffield Canal Co. v. Sheffield & R. Ry. Co., 3 Ry. Cas. 121, 132; Arthur v. Gordon (C. C.) 37 Fed. 558; Richardson v. Lenhard, 48 Kan. 629, 29 Pac. 1076. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[7] Hyde v. Wrench, 3 Beav. 336; First Nat. Bank v. Hall, 101 U. S. 50, 25 L. Ed. 822; Minneapolis & St. L. Ry. Co. v. Rolling-Mill Co., 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; Carr v. Duval, 14 Pet. 77, 10 L. Ed. 361; Derrick v. Monette, 73 Ala. 75; Jenness v. Iron Co., 53 Me. 20; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Clay v. Ricketts, 66 Iowa, 362, 23 N. W. 755; Cornwells v. Krengel, 41 Ill. 394; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Iron Works v. Douglas, 49 Ark. 355, 5 S. W. 585; Northwestern Iron Co. v. Meade, 21 Wis. 474, 94 Am. Dec. 557; First Nat. Bank v. Clark, 61 Md. 400, 48 Am. Rep. 114; Crabtree v. Opera-House Co. (C. C.) 89 Fed. 746; W. & H. M. Goulding v. Hammond, 4 C. C. A. 533, 54 Fed. 639. *See "Contracts," Dec. Dig. (Key-No.) § 24; Cent. Dig §§ 100–103.*

[8] Hyde v. Wrench, 3 Beav. 336. *See "Contracts," Dec. Dig. (Key-No.) § 24; Cent. Dig. §§ 100–103*

Death or Insanity of Party

The death [9] or insanity [10] of either party before acceptance of an offer causes the offer to lapse. An acceptance communicated to the personal representatives of the proposer after his death cannot bind them; nor can the representatives of the person to whom an offer has been made, and who has since died, bind the proposer by accepting it on behalf of the estate. An offer, as we have said, is considered as continuing up to the time of acceptance, but if one of the parties dies, then there is on one by whom or to whom, as the case may be, the offer can be considered as being made.[11] The fact that an acceptance is dispatched in ignorance of the proposer's death can make no difference. Since, however, an acceptance by mail takes effect at the moment of its dispatch, the death of the proposer before the receipt of the acceptance, but after it has been mailed, does not cause the offer to lapse, since, before his death, it has been turned into a binding promise by the acceptance.[12]

So, also, the dissolution of a partnership after an offer has been made by the firm, and before its acceptance, with notice thereof to the person to whom the offer was made, revokes the offer;[13] and it would seem that dissolution of a firm to whom an offer is made, before acceptance, must necessarily cause the offer to lapse, as the party to whom the offer was made is no longer in existence.

[9] Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Pratt v. Trustees of Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187; In re Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449; Frith v. Lawrence, 1 Paige (N. Y.) 434; Blades v. Free, 9 Barn. & C. 167; Campanari v. Woodburn, 15 C. B. 400; Lee v. Griffin, 1 Best & S. 272; Aitkin v. Lang's Adm'r, 106 Ky. 652, 51 S. W. 154, 90 Am. St. Rep. 263; Werner v. Humphreys, 2 Man. & G. 853; Marr v. Shaw (C. C.) 51 Fed. 860. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 20; Cent. Dig. § 58; "Corporations," Dec. Dig. (Key-No.) § 83; Cent. Dig. §§ 328–336; "Subscriptions," Dec. Dig. (Key-No.) §§ 4, 18; Cent. Dig. §§ 5, 20, 21.*

[10] The Palo Alto, 2 Ware, 344, Fed. Cas. No. 10,700; Beach v. First M. E. Church, 96 Ill. 177. It seems that knowledge of the insanity by the other party is essential. Drew v. Nunn, 4 Q. B. Div. 661; Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599. As to validity of contract of insane person, see post, p. 223. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. § 58.*

[11] Frith v. Lawrence, supra; Pratt v. Trustees, supra. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 20; Cent. Dig. §§ 57–60, 67–70.*

[12] Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262. *See "Contracts," Dec. Dig. (Key-No.) §§ 19, 20; Cent. Dig. §§ 57–60, 67–70.*

[13] Goodspeed v. Plow Co., 45 Mich. 322, 7 N. W. 902. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60; "Partnership," Dec. Dig. (Key-No.) § 243; Cent. Dig. §§ 510–513.*

OFFERS TO THE PUBLIC GENERALLY

25. An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

In order that an offer may result in a contract it need not be made to a definitely ascertained person. It may be made to any one of the public generally, or to any one of a class of persons, who may accept it. These offers are sometimes said to be made "to all the world," but this is not correct.[14] Take, for instance, the case of a proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, such as an advertisement for the return of lost property, or for the apprehension of persons who have committed a crime, or for certain information. This is an offer, to any one who shall accept it, of a promise for an act, and becomes a binding promise to pay the reward as soon as any individual renders the services.[15]

Offers of this character are generally advertisements for such services as we have mentioned, but they are not limited to them.[16] Sellers of a medicinal remedy, who, to increase their sales, advertise

[14] See Spencer v. Harding, L. R. 5 C. P. 561. *See "Contracts," Dec. Dig. (Key-No.) § 17; Cent. Dig. §§ 112–118.*

[15] Wentworth v. Day, 3 Metc. (Mass.) 352, 37 Am. Dec. 145; Besse v. Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Loring v. City of Boston, 7 Metc. (Mass.) 409; Wilson v. Guyton, 8 Gill (Md.) 213; Pierson v. Morch, 82 N. Y. 503; First Nat. Bank v. Hart, 55 Ill. 62; Montgomery County v. Robinson, 85 Ill. 174; Harson v. Pike, 16 Ind. 140; Goldsborough v. Cradie, 28 Md. 477; Ryer v. Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Hayden v. Souger, 56 Ind. 42, 26 Am. Rep. 1; Thruston v. Thornton, 1 Cush. (Mass.) 91; Morse v. Bellows, 7 N. H. 549, 563, 28 Am. Dec. 372; Janvrin v. Town of Exeter, 48 N. H. 83, 2 Am. Rep. 185; Cummings v. Gann, 52 Pa. 484; Morrell v. Quarles, 35 Ala. 544. As to the intention to become bound, see post, p. 50, note 28. *See "Rewards," Dec. Dig. (Key-No.) §§ 3–7; Cent. Dig. §§ 3–7.*

[16] Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612. A published time table is an offer by the railroad company to the public generally that, if they will apply for a ticket for carriage, they will be carried as stated in the time table, and the offer is accepted by each person who applies for a ticket. Denton v. Great Northern R. Co., 5 El. & Bl. 860; Sears v. Railroad Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780. The same doctrine has been applied in the case of bounties offered by towns, cities, or counties to any person who should enlist into the military service of the United States. Crowell v. Hopkinton, 45 N. H. 9. As to offers of premiums in horse races, see Alvord v. Smith, 63 Ind. 58. Offer by persons purchasing railroad on foreclosure and organizing new company to exchange new stock for old. Schorestene v. Iselin, 69 Hun, 250, 23 N. Y. Supp. 557. As to general letter of credit as being a general offer resulting in a promise to persons giving credit on the strength

that a certain sum will be paid to any person who buys and uses the remedy, and afterwards contracts the disease it is claimed to prevent, will become bound by contract obligation to any person who purchases and uses the remedy, and he may recover the sum promised if he contracts the disease.[17]

Such a general offer may be made orally. Thus, where a person, whose wife was in a burning building, exclaimed to the bystanders generally that he would give a certain sum to any person who would bring out her body, and a man did so, it was held that he could recover the sum promised.[18]

Acceptance and Revocation

Offers of this character cannot result in contract obligation until they are accepted by an ascertained person by performing the services. Before the services are rendered, there is merely an offer, which may be revoked.[19] An acceptance by performance of the services after the offer has been withdrawn does not bind the proposer,[20] and it even seems that ignorance of the withdrawal makes no difference, if the withdrawal was as publicly made as the offer.[21] If no time is stated within which the offer is to remain open, it will lapse after the expiration of a reasonable time; that is, performance of the service, to constitute an acceptance, must be within a reasonable time after the making of the offer or the last publication thereof.[22]

of it, see Ex parte Asiatic Banking Corp., 2 Ch. App. 391. *See "Contracts," Dec. Dig. (Key-No.) § 17; Cent. Dig. §§ 112–118.*

[17] Carlill v. Carbolic Smoke-Ball Co., [1892] 2 Q. B. 484, 4 Rep. 176; Id., [1893] 1 Q. B. 256. So, where a person invites architects to submit designs, stating that all who submit plans shall receive a certain sum, and that the one whose plans are the best shall be engaged as architect, he becomes bound to pay the sum specified to all who submit plans, and, if he adjudges one of the plans the best, to make that architect the architect of the building. Walsh v. Association, 16 Mo. App. 502; Id., 90 Mo. 459, 2 S. W. 842. *See "Contracts," Dec. Dig. (Key-No.) § 17; Cent. Dig. §§ 112–118.*

[18] Reif v. Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731. And see Hayden v. Souger, 56 Ind. 42, 26 Am. Rep. 1. *See "Rewards," Dec. Dig. (Key-No.) §§ 3–7; Cent. Dig. §§ 3–7.*

[19] Harson v. Pike, 16 Ind. 140; Freeman v. City of Boston, 5 Metc. (Mass.) 56; Cummings v. Gann, 52 Pa. 484. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[20] Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697; Biggers v. Owen, 79 Ga. 658, 5 S. E. 193. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[21] Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697. *See "Contracts," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 57–60.*

[22] Loring v. City of Boston, 7 Metc. (Mass.) 409 (holding 3 years and 8 months more than a reasonable time); Mitchell v. Abbott, 86 Me. 338, 29 Atl. 1118, 25 L. R. A. 503, 41 Am. St. Rep. 559 (holding 12 years more than

Performance of Services in Ignorance of Offer—Motive

Suppose that the person performing the service does not know of the offer, or does not realize all its terms, does he thereby accept the offer and acquire a right to the reward? In a leading English case a reward had been offered by the defendant for information which was supplied by the plaintiff, but not with a view to the reward. The report of the case does not show that the plaintiff was unaware of the offer; the only point which seems to have been raised being that the reward was not the motive which induced the plaintiff to supply the information. The court held that the motive was immaterial, and that "there was a contract with the person who performed the condition mentioned in the advertisement." [23]

In this country, some courts, influenced in large measure by a misconception of the point decided in Williams v. Carwardine, have held that ignorance of the offer does not prevent a recovery of the reward by the person performing the services.[24] The better rule, however, and that supported by the weight of authority, is that the reward may not be recovered by one who performs the services in ignorance of the offer.[25] "To the existence of a contract," it was said in the leading American case,[26] "there must be mutual assent, or, in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that, there is no contract. How, then, can there be consent or assent to that of which the party has never heard?" It has

a reasonable time); Shaub v. Lancaster, 156 Pa. 362, 26 Atl. 1067, 21 L. R. A. 691 (holding 17 years from the first offer and 10 years from the last publication more than a reasonable time). In In re Kelly, 39 Conn. 159, it was held that the offer of a reward for the arrest of a person guilty of a particular crime would not lapse until prosecution was barred by the statute of limitations. *See "Contracts," Dec. Dig. (Key-No.) § 20; Cent. Dig. §§ 67–70.*

[23] Williams v. Carwardine, 4 Barn. & Adol. 621, 6 Eng. Rul. Cas. 133. *See "Contracts," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 82–92; "Rewards," Dec. Dig. (Key-No.) §§ 3–7; Cent. Dig. §§ 3–7.*

[24] Dawkins v. Sappington, 26 Ind. 199; Russell v. Stewart, 44 Vt. 170; Auditor v. Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728; Eagle v. Smith, 4 Houst. (Del.) 293; Crawshaw v. City of Roxbury, 7 Gray (Mass.) 377; Everman v. Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284. *See "Rewards," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[25] Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Marvin v. Treat, 37 Conn. 96, 9 Am. Rep. 307; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Williams v. Railway Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278. BROADNAX v. LEDBETTER, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057, Throckmorton Cas. Contracts, 27. *See "Rewards," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[26] Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791. *See "Rewards," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

even been held, contrary to the point actually decided in Williams v. Carwardine, that the motive in performing the services is material, and that there must at the time be an intent to claim the reward, as well as knowledge that it is offered.[27]

OFFER AS REFERRING TO LEGAL RELATIONS

26. The offer must be intended to create, and be capable of creating, legal relations.

Intention to Create Legal Relations

In order that an offer or proposal may be turned into a binding contract by acceptance, it must be made in contemplation of legal consequences. A mere statement of intention, for instance, made in the course of conversation, will not result in a binding promise, though acted upon by the party to whom it was made.[28] Thus, where a father said to a man that he would give a certain sum to him who married his daughter with his consent, and the man married her, and sued for the money, it was held that he could not recover, as it was not reasonable that a man "should be bound by general words spoken to excite suitors."[29] Nor will services rendered for another and accepted by him place him under a contractual obligation to pay for them, where payment therefor was not expected nor intended.[30]

[27] Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65. *See "Rewards," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[28] Week v. Tibold, Rolle, Abr. 6; Randall v. Morgan, 12 Ves. 67; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Stagg v. Compton, 81 Ind. 171; Erwin v. Erwin, 25 Ala. 236; Carson v. Lucas, 13 B. Mon. (Ky.) 213; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; Kirksey v. Kirksey, 8 Ala. 131; Lakeside Land Co. v. Dromgoole, 89 Ala. 505, 7 South. 444; Thruston v. Thornton, 1 Cush. (Mass.) 89; Higgins v. Lessig, 49 Ill. App. 459. Statements by a married child that she intends to pay her parents for support, made to third persons, result in no contract on her part. Perkins v. Westcoat, 3 Colo. App. 338, 33 Pac. 139. The rule above stated applies to offers of reward made to the public generally. Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Higgins v. Lessig, 49 Ill. App. 459. See, also, Ulrich v. Arnold, 120 Pa. 170, 13 Atl. 831. *See "Contracts," Dec. Dig. (Key-No.) §§ 14, 16; Cent. Dig. § 50.*

[29] Week v. Tibold, supra. And see Randall v. Morgan, supra. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56.*

[30] The fact that services are rendered does not create a liability on the part of the person for whom they are rendered, even though done at his request, where the circumstances are such as to repel the inference that compensation was intended; and, when performed merely from kindly or charitable motives, the law will not imply a promise to pay for them. Cicotte v.

On the same footing stand engagements of pleasure, or agreements which, from their nature, do not admit of being regarded as business transactions.[31]

Same—Jest

Transactions intended as a joke or jest cannot result in a contract, for the reason that there is no intention to contract; there is no contemplation of legal consequences.[32]

Same—Invitations to Deal

Offers which, by acceptance, may be turned into binding promises, must be distinguished from offers which merely amount to invitations to deal. Illustrations of this arise where merchants send out circulars offering goods for sale on certain terms, not intending the circular as an offer to become binding on acceptance, but merely as an invitation to persons to enter into negotiations;[33] or where a person, wishing to have work done, or to buy goods, advertises for proposals;[34] or where a person advertises that he will sell goods at auction.[35] The circulars of the merchant, the advertisement for proposals, and the advertisement of the auction sale, are mere declarations of intention. Legal consequences are not directly contemplated, and no contract relation arises with persons who may send an order for goods, or make bids, or attend the auction. The rule applies whenever it is clear that a proposition was

Church of St. Anne, 60 Mich. 552, 27 N. W. 682. And see Covel v. Turner, 74 Mich. 408, 41 N. W. 1091; Gross v. Cadwell, 4 Wash. 670, 30 Pac. 1052; Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701; Everitt v. Walker, 109 N. C. 129, 13 S. E. 860; Collyer v. Collyer, 113 N. Y. 442, 21 N. E. 114. See, also, ante, p. 20, and cases cited. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56.*

[31] Anson, Cont. (4th Ed.) 19; ante, p. 5.

[32] McClurg v. Terry, 21 N. J. Eq. 225; Armstrong v. McGhee, Add. (Pa.) 261; Keller v. Holderman, 11 Mich. 248, 83 Am. Dec. 737; Bruce v. Bishop, 43 Vt. 161. Marriage ceremony performed in jest, but by a person duly authorized. McClurg v. Terry, supra. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56.*

[33] CHEROKEE TANNING EXTRACT CO. v. WESTERN UNION TELEGRAPH CO., 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806, Throckmorton Cas. Contracts, 31; Spencer v. Harding, L. R. 5 C. P. 561; Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; Lincoln v. Preserving Co., 132 Mass. 129; Knight v. Cooley, 34 Iowa, 218; Topliff v. McKendree, 88 Mich. 148, 50 N. W. 109; Allen v. Kirwan, 159 Pa. 612, 28 Atl. 495; Smith v. Weaver, 90 Ill. 392; Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337. *See "Sales," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 39–48.*

[34] Howard v. Industrial School, 78 Me. 230, 3 Atl. 657; Leskie v. Haselstine, 155 Pa. 98, 25 Atl. 886; Topping v. Swords, 1 E. D. Smith (N. Y.) 609. *See "Contracts," Dec. Dig. (Key-No.) § 17; Cent. Dig. §§ 112–118.*

[35] Harris v. Nickerson, L. R. 8 Q. B. 286. *See "Sales," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 39–48.*

intended merely as an invitation to deal, and not as an offer to become binding on acceptance.[36]

Same—Incomplete Negotiations

Similar to these cases are those in which the parties are carrying on negotiations, and have not yet come to an agreement. So long as the negotiations are incomplete, there is no contract.[37] "An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled." [38]

So, also, if the parties come to an agreement as to terms, but with the intention that their agreement is to be reduced to writing, and that they are not to be bound until this is done, there is no contract until the writing is drawn up and assented to by both as their

[36] CHEROKEE TANNING EXTRACT CO. v. WESTERN UNION TELEGRAPH CO., 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806, Throckmorton Cas. Contracts, 31. In Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516, the defendants wrote plaintiff: "We are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl. * * * Shall be pleased to receive your order,"—and the plaintiff at once replied, ordering 2,000 barrels, but the defendants refused to fill the order. The court held that defendants' letter was a simple notice that they were in a condition to supply salt for the price named, and an invitation to deal with them, and not an offer which plaintiff could change into a binding promise by his order. See, also, Beaupré v. Telegraph Co., 21 Minn. 155; Kinghorne v. Telegraph Co., U. C. 18 Q. B. 60; Lyman v. Robinson, 14 Allen (Mass.) 254; Smith v. Gowdy, 8 Allen (Mass.) 566; Schenectady Stove Co. v. Holbrook, 101 N. Y. 45, 4 N. E. 4; Harvey v. Facey, 1 Rep. 428; Id., [1893] App. Cas. 552; Patton v. Arney, 95 Iowa, 664, 64 N. W. 635. Cf. Keller v. Ybarru, 8 Cal. 147; College Mill Co. v. Fidler (Tenn. Ch.) 58 S. W. 382; Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337 [reversing 21 Misc. Rep. 13, 46 N. Y. Supp. 852]. *See "Auctions and Auctioneers," Dec. Dig. (Key-No.) §§ 7, 8; Cent. Dig. §§ 20–40.*

[37] Lyman v. Robinson, 14 Allen (Mass.) 242; Schenectady Stove Co. v. Holbrook, 101 N. Y. 45, 4 N. E. 4; Bean v. Clark (C. C.) 30 Fed. 225; Templeton v. Wile (City Ct.) 3 N. Y. Supp. 9; Commercial Tel. Co. v. Smith, 47 Hun (N. Y.) 494; Morris v. Brightman, 143 Mass. 149, 9 N. E. 512; Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; Shaw v. Glass Works, 52 N. J. Law, 7, 18 Atl. 696; Whiteford v. Hitchcock, 74 Mich. 208, 41 N. W. 898; Gates v. Nelles, 62 Mich. 444, 29 N. W. 73; Canning v. Farquhar, 16 Q. B. Div. 727, 55 L. J. Q. B. 225; Strong & Trowbridge Co. v. H. Baars & Co., 60 Fla. 253, 54 South. 92. And see ante, p. 35. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56.*

[38] Ridgway v. Wharton, 6 H. L. Cas. 268. And see Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; Sibley v. Felton, 156 Mass. 273, 31 N. E. 10; Strobridge Lithographing Co. v. Randall, 73 Fed. 619, 19 C. C. A. 611; St.

agreement.[39] If they come to a final agreement as to terms, it may, indeed, bind them, though they intend to reduce the terms into writing for the purpose of becoming bound in a more formal manner, or of preserving a memorial of the terms, or for any purpose other than that of making the writing exclusively their agreement.[40] The question is whether they intend legal consequences before the formal written evidence of their agreement is executed. If they do not, there is no contract until this is done; but, if they do intend to be bound without regard to the writing, there is a contract.[41] The question is one of fact; but the circumstance that they do intend a subsequent writing to be drawn up is said to be strong evidence that they do not intend to be bound by the preliminary agreement.[42]

Same—Delivery

It is sometimes said that delivery is necessary to give effect to a written contract, and this is true where by the agreement of the parties it is not to take effect until delivered.[43] Delivery in this sense, however, is not a necessary element of the contract imposed

Louis & S. F. R. Co. v. Gorman, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637. *See "Contracts," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 49–56.*

[39] Ocala Cooperage Co. v. Florida Cooperage Co., 59 Fla. 394, 52 South. 13. See, also, ante, p. 36. *See "Contracts," Dec. Dig. (Key-No.) § 32; Cent. Dig. § 159.*

[40] Leake, Cont. 98; Ridgway v. Wharton, 6 H. L. Cas. 268; Green v. Cole (Mo. Sup.) 24 S. W. 1058; Lewis v. Brass, L. R. 3 Q. B. Div. 667; Crossley v. Maycock, L. R. 18 Eq. 180; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; C. C. Emerson & Co. v. Stevens Grocer Co., 95 Ark. 421, 130 S. W. 541; Western Roofing Tile Co. v. Jones, 26 Okl. 209, 109 Pac. 225, Ann. Cas. 1912B, 127. And see ante, p. 36. *See "Contracts," Dec. Dig. (Key-No.) § 32; Cent. Dig. § 159.*

[41] Winn v. Bull, 2 Ch. Div. 29; Fowle v. Freeman, 9 Ves. 351; Gibbins v. Asylum District, 11 Beav. 1; Heyworth v. Knight, 17 C. B. (N. S.) 298; Rossiter v. Miller, 5 Ch. Div. 648; Commercial Tel. Co. v. Smith, 47 Hun (N. Y.) 494; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; Hodges v. Sublett, 91 Ala. 588, 8 South. 800; Lawrence v. Railroad Co., 84 Wis. 427, 54 N. W. 797; Mississippi & D. S. S. Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; Edge Moore Bridge Works v. Bristol County, 170 Mass. 528, 49 N. E. 918. See, also, ante, p. 36. *See "Contracts," Dec. Dig. (Key-No.) § 32; Cent. Dig. § 159.*

[42] Leake, Cont. 98; Ridgway v. Wharton, 6 H. L. Cas. 268. *See "Contracts," Dec. Dig. (Key-No.) §§ 28, 29; Cent. Dig. §§ 133–143.*

[43] American Copying Co. v. Muleski, 138 Mo. App. 419, 122 S. W. 384; Ligon v. Wharton (Tex. Civ. App.) 120 S. W. 930. If a contract is placed in escrow, to be delivered upon the happening of a certain event, its delivery in violation of the condition does not give it effect, because there is no meeting of minds or common intention to be bound. Carpenter v. Carpenter, 141 Wis. 544, 124 N. W. 488. *See "Contracts," Dec. Dig. (Key-No.) § 42; Cent. Dig. §§ 207–214; "Escrows," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 17–20.*

by law, but rather an act evidencing the final agreement of the parties. It would be equally competent for them to agree that the contract should become binding without delivery.

Offer as Capable of Creating Legal Relations—Definiteness and Certainty

An offer or proposal must be capable of creating legal relations, or no contract can result. An agreement cannot create an obligation, or legal relations, unless it is capable of being enforced by the courts; and, as we have seen, creation of an obligation is essential.

It follows that, to result in a contract, the agreement must be sufficiently definite and certain to enable the court to collect from it the full intention of the parties, for the court cannot make an agreement for them.[44] The parties may have come to a real agreement, but they must take the chances of not having made it intelligible.[45] It is generally said that the contract or the agreement or the promise must be certain, but it is the same thing to say that the offer must be certain. An uncertain offer is sometimes apparently remedied by its acceptance, but this is not really so, for an acceptance must be identical with the terms of the offer. If it varies from them, as it must in order to remedy uncertainty in the offer, it is not an acceptance, but a counter offer.

The rule, then, is that the offer must not be so indefinite as to make it impossible for the court to say what was promised.[46] Thus, where a person bought a horse, and promised that, if it was lucky to him, he would give a certain additional sum, "or the buying of another horse," it was held that the promise was too loose and

[44] Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Marble v. Oil Co., 169 Mass. 553, 48 N. E. 785; In re Purves' Estate, 196 Pa. 438, 46 Atl. 369; Faulkner v. Drug Co., 117 Iowa, 120, 90 N. W. 585; Butler v. Kemmerer, 218 Pa. 242, 67 Atl. 332 (collecting cases); Northrup v. Colter, 150 Mo. App. 639, 131 S. W. 364. Uncertainty as to price or terms of payment on sale of land. George v. Conhaim, 38 Minn. 338, 37 N. W. 791; Smoyer v. Roth (Pa. Sup.) 13 Atl. 191; Everett v. Dilley, 39 Kan. 73, 17 Pac. 661. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

[45] Pol. Cont. 42.

[46] CHEROKEE TANNING EXTRACT CO. v. WESTERN UNION TELEGRAPH CO., 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806, Throckmorton Cas. Contracts, 31; Guthing v. Lynn, 2 Barn. & Adol. 232; Sherman v. Kitsmiller, 17 Serg. & R. (Pa.) 45; Freed v. Mills, 120 Ind. 27, 22 N. E. 86; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Erwin v. Erwin, 25 Ala. 236; Northrup v. Colter, 150 Mo. App. 639, 131 S. W. 364; Gray v. Toledo, St. L. & W. R. Co., 143 Mo. App. 251, 128 S. W. 227; Harvey v. Facey, L. R. [1893] App. Cas. 552. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

vague to be considered in a court of law.[47] And so, where a person agrees to perform services for such remuneration as shall be deemed right, or for such wages as his employer shall deem right or reasonable, or for "good wages," it is held that there is not a sufficiently definite promise of payment to be capable of enforcement.[48]

Same—"Id Certum est Quod Certum Reddi Potest"

This rule, however, is subject to the maxim, "Id certum est quod certum reddi potest." [49] For this reason an offer to sell goods need not necessarily specify the amount that may be ordered, but may leave it for the person to whom the offer is made to specify the amount in his acceptance. If this is the intention of the parties, the acceptance concludes the contract, and does not amount to a counter proposal necessary to be accepted.[50] The intention is important here, in order to distinguish these cases from those in which it is held that the acceptance does not conclude a contract because the proposer did not intend to affect his legal relations, but merely to

[47] Guthing v. Lynn, supra. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

[48] Taylor v. Brewer, 1 Maule & S. 290; Roberts v. Smith, 4 Hurl. & N. 315; Fairplay School Tp. v. O'Neal, 127 Ind. 95, 26 N. E. 686. But see Caldwell v. School Dist. (C. C.) 55 Fed. 372; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934. The following promises have been held void for uncertainty: To give a person a house, and provide for her at promisor's death, if she would live with him. Wall's Appeal, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288. To let a person retain possession of property on his paying the same rent the promisor "might be able to obtain from other parties." Gelston v. Sigmund, 27 Md. 334. That a person should have preference in renting of property so long as it should be rented for store. Delashmutt v. Thomas, 45 Md. 140. To take a house "if put into thorough repair," and if the drawing rooms were "handsomely decorated, according to the present style." Taylor v. Portington, 7 De Gex, M. G. 328. To sell land, reserving "the necessary land for making a railway." Pearce v. Watts, 20 Eq. 492. Agreement by which a person is to work in a mine, and receive a certain sum per ton on all ore produced, as long as the mine can be made to pay. Davie v. Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357. Promise to take note for certain sum, without specifying terms. Van Schaick v. Van Buren, 70 Hun, 575, 24 N. Y. Supp. 306. On order for goods which does not state the quantity, quality, or price to be paid. Price v. Stipek, 39 Mont. 426, 104 Pac. 195. A promise to divide a profit, if any is made, on a very liberal basis. Butler v. Kemmerer, 218 Pa. 242, 67 Atl. 332. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

[49] Parker v. Pettit, 43 N. J. Law, 512; Miller v. Kendig, 55 Iowa, 174, 7 N. W. 500; Thompson v. Stevens, 71 Pa. 161. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

[50] Dambmann v. Lorentz, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

invite negotiations.[51] For the same reason it is not necessary, in offering to sell goods, to name the price, for, if no price is specified, a seasonable price will be implied. Other illustrations of the application of this rule are given below.[52]

Same—Capacity of Parties—Form—Consideration—Legality of Object

In order that an offer be capable of creating legal relations, (a) it must be made by and to a party capable of contracting; (b) it must be made in the form prescribed by law; (c) if it is to be accepted by the giving of a promise, it must be a consideration for

[51] Ante, p. 51.

[52] The following contracts have been held sufficiently certain: Contract making extent of promisor's liability such as may be imposed by a certain statute. Town of Hamden v. Merwin, 54 Conn. 418, 8 Atl. 670. A promise to buy all the supplies of a certain kind the promisor may need. Lenz v. Brown, 41 Wis. 172; Levey v. Railroad Co., 4 Misc. Rep. 415, 24 N. Y. Supp. 124; Minnesota Lumber Co. v. Coal Co., 160 Ill. 85, 43 N. E. 775, 31 L. R. A. 529; Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227. See post, p. 149.. A promise to sell all the future produce of a certain vineyard the promisee may wish. Keller v. Ybarru, 3 Cal. 147. And see Bates v. Childers, 5 N. M. 62, 20 Pac. 164; Booske v. Ice Co., 24 Fla. 550, 5 South. 247; McCall Co. v. Icks, 107 Wis. 232, 83 N. W. 300. Definiteness as to territory in which party shall have exclusive right to sell goods,—"in D. and the territory tributary thereto." Kaufman v. Manufacturing Co., 78 Iowa, 679, 43 N. W. 612, 16 Am. St. Rep. 462. Cf. Hauser v. Harding, 126 N. C. 295, 35 S. E. 586. Describing a party as "Mr. Lee" does not render the contract uncertain, as it may be explained by parol. Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800. Promise to erect "a good steam sawmill." Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506. Sale of a stock of merchandise, "all soiled or damaged goods at valuation." Sergeant v. Dwyer, 44 Minn. 309, 46 N. W. 444. Promise to employ a person "for 12 months commencing not later than the 15th of July, possibly the 1st of July, the date to be fixed by" the promisee. Troy Fertilizer Co. v. Logan, 96 Ala. 619, 12 South. 712. Agreement to furnish a person with "steady and permanent employment." Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289. See, also, Carnig v. Carr, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488. Agreement to furnish a certain number of car loads of lumber, a car load varying from 35,000 to 60,000 feet. Indianapolis Cabinet Co. v. Herrmann, 7 Ind. App. 462, 34 N. E. 579. Sale of nine walnut trees standing on the vendor's land, marked when the sale is made. Carpenter v. Medford, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535. Contract with provision that it should be renewed for further term if plaintiff succeeded in doing such a business as defendant might "reasonably expect." Worthington v. Beeman, 91 Fed. 232, 33 C. C. A. 475. Contract providing for a "reasonable compensation." Wehner v. Bauer (C. C.) 160 Fed. 240. Contract to pay a sum which will be "right" or "satisfactory." Silver v. Graves, 210 Mass. 26, 95 N. E. 948. Contract to pay "a fair and equitable share of the net profits" of a business. Noble v. Joseph Burnett Co., 208 Mass. 75, 94 N. E. 289. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

the promise; and, if it is an offer of a promise, the act, forbearance, or promise asked in return must be a consideration; and (d) the act or forbearance done or contemplated must be lawful. These matters will be discussed in subsequent chapters, dealing with the capacity of parties, form, consideration, and legality of the object of contracts.

CHAPTER III

CLASSIFICATION OF CONTRACTS—CONTRACTS UNDER SEAL AND CONTRACTS OF RECORD

27. Classification of Contracts.
28. Contracts of Record.
29. Contracts Under Seal.
30–32. How Contracts Under Seal are Made.
33. Characteristics of Contract Under Seal.
34. Necessity for Contract Under Seal.

In the last chapter we dealt with the mode in which the common intention of the parties must be communicated, and showed how it must refer to legal relations, in order that it may form the basis of a contract. It is not enough, however, that the common intention of the parties be communicated in the mode we have described, and that the parties intend legal consequences. Most systems of law require some further evidence of the intention of the parties, without which mere intention will not avail to create an obligation between them. In our law this evidence is supplied by form and consideration. Sometimes one, sometimes the other, and sometimes both are required to render a contract enforceable. By "form" is meant some peculiar solemnity attaching to the expression of agreement; by "consideration," some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee, or some detriment suffered by the promisee.[1]

CLASSIFICATION OF CONTRACTS

27. Contracts are divided into—

(a) Contracts dependent for their validity upon their form alone, or strictly formal contracts. These are:
  (1) Contracts of record.
  (2) Contracts under seal.

(b) Simple or parol contracts, which may be divided into—
  (1) Such as are dependent for their validity both on their form and on the presence of consideration. These are contracts not under seal, nor of record, but which are required by law to be in writing, either with or without a particular form.

[1] Anson, Cont. (8th Ed.) 43. The student will do well to read in this connection what Anson says in regard to the history and development of the doctrines of form and consideration. See Anson, Cont. (8th Ed.) pp. 43–48.

(2) Such as are dependent for their validity upon the presence of consideration alone, no form at all being required.

Sir William Anson divides contracts into (a) formal contracts, or contracts dependent for their validity upon their form, under which he classes (1) contracts of record, and (2) contracts under seal; and (b) simple contracts, or contracts which he declares to be dependent for their validity upon the presence of consideration, and under which he classes (1) contracts required by law to be in some form other than under seal, and (2) contracts for which no form is required. This classification, however, has been objected to on the ground "that a contract which the law requires to be in writing, such as a promissory note or a guaranty, is as much dependent for its validity upon the form, and is as truly a formal contract, as one under seal. The latter requires only a writing and a seal, the former a writing and a consideration; but the writing in this instance is just as essential as is the consideration." [2]

There are two classes of contracts which at common law depend for their validity upon their form alone. These are contracts under seal and contracts of record. They are strictly formal contracts. All other contracts are called "simple" or "parol" contracts, and depend for their validity upon the presence of consideration. Some of these contracts are also required to be in writing, as in the case of bills of exchange and promissory notes, in the case of which a particular form is also required, and contracts within the statute of frauds; so that they depend for their validity upon their form as well as upon the presence of consideration. Simple contracts, not required by the common law or by statute to be in writing, may be made by word of mouth, or by conduct, as we have explained in treating of offer and acceptance. They need no particular form, but depend for their validity upon the presence of consideration alone.

We have, then, three classes of contracts: (a) Contracts of record; (b) contracts under seal; and (c) simple or parol contracts; or, if we classify according as a contract depends for its validity upon form or consideration, or both, we have: (a) Contracts dependent for their validity upon their form alone, or (1) contracts of record, and (2) contracts under seal; (b) simple or parol contracts, which are dependent for their validity both on their form and on the presence of consideration, or contracts required to be in writing, but not under seal nor of record; and (c) simple or parol contracts,

[2] Brantly, Cont. 33.

for which no form at all is required, and which depend for their validity upon the presence of consideration alone.

All of these contracts, except contracts under seal and contracts of record, are called "simple" or "parol" contracts. The word "parol" strictly means "by word of mouth," and excludes writing; but the term is applied to all simple contracts, whether they are merely oral or required to be in writing. They all require consideration, the only distinction being in the fact that some must be in writing.[3]

We shall now deal with the contracts of record and contracts under seal, and in following chapters with those forms which are superimposed upon simple contracts, and with consideration, the requisite common to all simple contracts.

CONTRACTS OF RECORD

28. The obligations which are styled "contracts of record" are:

(a) Judgments of courts of record, whether entered by consent or rendered in invitum. In the latter case, however, the obligation is quasi contractual, and not contractual.

(b) Recognizances, which are obligations, entered into before a court of record, to do or forbear from doing a certain thing under a penalty.

Judgments

A judgment of a court of record awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. The judgment is entered upon the record of the court, and for this reason is called a "formal" contract. This obligation may come into existence as the final result of litigation when the court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. In the latter case there is agreement, and the agreement results in obligation. The judgment, therefore, has the features of contract. In the former, however, there is no consent on the part of the person bound, and the obligation, therefore, is not contractual, but quasi contractual.[4]

[3] **RANN v. HUGHES, 7 Term R. 350, Throckmorton, Cas. Contracts, 34; Whitehill v. Wilson, 3 Pen. & W. (Pa.) 405, 24 Am. Dec. 326; Perrine v. Cheeseman, 11 N. J. Law, 174, 19 Am. Dec. 388; Stabler v. Cowman, 7 Gill & J. (Md.) 284.** **See post, p. 76.** *See "Contracts," Dec. Dig. (Key-No.) §§ 30–32; Cent. Dig. §§ 144–147.*

[4] **O'BRIEN v. YOUNG, 95 N. Y. 428, 47 Am. Rep. 64, Throckmorton, Cas. Contracts, 36, in which it is said, per Earl, J.: "The most important elements**

Where the judgment is entered by agreement, the obligation results from a contract for the making of which certain formalities are required,—either a warrant of attorney, by which one party gives authority to the other to enter judgment upon terms settled, or a cognovit actionem, by which the one party acknowledges the right of the other in respect of the pending dispute, and then gives a similar authority.[5]

Characteristics of Judgment—Estoppel

The characteristics of an obligation of this nature are these:

(1) Its terms, so long as it has not been regularly vacated or reversed, admit of no dispute, but are conclusively proved by a production of the record. The judgment, however, to be so conclusive, must be valid. It must have been rendered by a court having jurisdiction of the subject-matter and of the parties, and must have been properly entered of record.[6]

Same—Merger—Res Judicata

(2) As soon as it is created, the previously existing rights with which it deals merge or are extinguished in it. For instance, where a person sues another for breach of contract, or for a civil injury, and a judgment is entered, either by consent or after trial, neither party has any further rights in respect of the cause of action. The judgment conclusively settles their rights, and the matter is said to be res judicata.[7] Difficulties arise in applying the doctrine, but

of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented. All the authorities assert that the existence of parties legally capable of contracting is essential to every contract, and yet they nearly all agree that judgments entered against lunatics and others incapable in law of contracting are conclusively binding until vacated or reversed." To the same effect, see Morley v. Lake Shore & M. S. R. Co., 145 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925. Contra, Rockwell v. Butler, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611. And see note 17 L. R. A. 611; ante, p. 10; post, p. 634. *See "Judgment," Dec. Dig. (Key-No.) § 3.*

[5] See Leake, Cont. 89–95.

[6] Vooght v. Winch, 2 Barn. & Ald. 662; The Rio Grande v. Otis, 23 Wall. 458, 23 L. Ed. 158; Osage City Bank v. Jones, 51 Kan. 379, 32 Pac. 1096; Le Grange's Lessee v. Ward, 11 Ohio, 258; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Burwell v. Burgwyn, 105 N. C. 498, 10 S. E. 1099; Suber v. Chandler, 36 S. C. 344, 15 S. E. 426; Junkans v. Bergin, 64 Cal. 203, 30 Pac. 627; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. 74; Hollister v. Abbott, 31 N. H. 442, 61 Am. Dec. 342; post, p. 617. *See "Judgment," Dec. Dig. (Key-No.) § 634; Cent. Dig. § 1150.*

[7] Smith v. Nichols, 5 Bing. N. C. at page 220; Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903; Todd v. Stewart, 9 Q. B. 759; Oregonian Ry. Co. v. Navigation Co. (C. C.) 27 Fed. 277; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Hill v. Morse, 61 Me. 541; post, p. 599. *See "Judgment," Dec. Dig. (Key-No.) §§ 540, 560; Cent. Dig. §§ 999–1002, 1079.*

it would be beyond the scope of a book on contracts to go into the subject.

Same—Remedies of Creditor

(3) The judgment creditor, or person in whose favor the judgment is entered, has certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt. He can take out execution on the judgment, and so obtain directly the sum awarded, and he can also bring an action on the judgment for nonfulfillment of the obligation.[8]

Recognizance

A recognizance is an obligation of record entered into generally, but not necessarily, in a criminal case, before some court of record or magistrate duly authorized, with condition to do some particular act; as, for instance, to appear at court as a witness, or for trial, to keep the peace, or to pay a debt.[9]

CONTRACTS UNDER SEAL

29. Contracts under seal, otherwise called "deeds" or "specialties," derive their validity, at common law, from their form alone, and not from the fact of agreement or consideration.

It is often said that the seal imports a consideration, but, as we shall see, this is incorrect. At common law the question of consideration is altogether immaterial. The form alone gives the contract its validity.[10]

All contracts under seal are called "deeds" or "specialties." We generally use the term "deed" as applying to conveyances of land, but it applies as well to all contracts under seal. Particular contracts under seal, deeds, or specialties are: (1) Grants or conveyances of land, in which the parties are called respectively "grantor" and "grantee;" (2) bonds, which are obligations conditioned upon the payment of money, or the doing or forbearance from doing some act, the parties to a bond being called respectively "obligor" and "obligee;" and (3) covenants, which are agreements between two or more persons, entered into by deed—that is, under seal—

[8] Jones v. Williams, 13 Mees. & W. 628. *See "Judgment," Dec. Dig. (Key-No.) § 900; Cent. Dig. § 1719.*

[9] Black, Law Dict. tit. "Recognizance;" 2 Bl. Comm. 341. It is not signed by the party entering into it. People v. Barrett, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 93 Am. St. Rep. 230. *See "Recognizance," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–19.*

[10] Leake, Cont. 76.

whereby one or more of them promises the other or others the performance or nonperformance of certain acts, or that a given state of things does or shall or does not or shall not exist, the parties being called respectively "covenantor" and "covenantee."

HOW CONTRACTS UNDER SEAL ARE MADE

30. A deed must be in writing, and must be sealed and delivered, and possibly signed.

31. It takes effect from the date of its delivery.

32. ESCROW—A deed may be delivered to a third person to be delivered to the other party to it on the performance of a condition, and in such case takes effect, on performance of the condition, from the date of the original delivery.

A deed must be in writing or printed on paper or parchment.[11]

It is often said to be executed, or made conclusive as between the parties, by being "signed, sealed, and delivered." At common law there seems to be some doubt whether signature to a deed is necessary,[12] but it is, to say the least, safer to sign. That, however, which identifies a party to a deed with its execution is the presence of his seal; that which makes it operative, so far as he is concerned, is the fact of its delivery by him.[13]

The Seal

There cannot be a deed or specialty without a seal.[14]

A seal is said by Lord Coke to be wax, with an impression,[15] and no doubt anciently wax was the only substance used; but it is no

[11] A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. * * * A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted." Shep. Touch. 50; Co. Litt. 35b. For the reason why a deed may not be written on wood, see Pol. Cont. 156. It may well be doubted whether the old rule requiring paper or parchment exclusively would be strictly followed to-day. *See "Deeds," Dec. Dig. (Key-No.) §§ 26, 28; Cent. Dig. §§ 50–53.*

[12] Leake, Cont. 76; Cooch v. Goodman, 2 Q. B. 597; Cromwell v. Grunsden, 2 Salk. 462; Jeffery v. Underwood, 1 Ark. 108. *See "Deeds," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 89–94.*

[13] Anson, Cont. (4th Ed.) 46.

[14] State v. Thompson, 49 Mo. 188; Vance v. Funk, 2 Scam. (Ill.) 263; Chilton v. People, 66 Ill. 501; Stabler v. Cowman, 7 Gill & J. (Md.) 284; Boothbay v. Giles, 68 Me. 160; Corbin v. Laswell, 48 Mo. App. 626. Where, however, a seal is omitted by mistake, a court of equity will reform the instru-

[15] 3 Coke, Inst. 169.

longer essential. The impression may be made on a wafer attached to the instrument, or any other substance sufficiently tenacious to adhere, and capable of receiving an impression.[16] It is therefore held sufficient if the impression is made on the paper itself on which the instrument is written. It need not be on a separate substance attached to the instrument.[17]

Some of the states have passed statutes allowing a scroll or scrawl made with the pen to be used in the place of a seal,[18] and some courts have held, independent of statute, that a scroll is sufficient.[19] At common law, however, this is not permissible; there must be an impression.[20]

At common law the mere affixing of the seal makes the instrument a contract under seal, but it has been held that, where a scroll is used, there must be some recital in the body of the instrument

ment by supplying one, or will restrain the setting up of the want of one to defeat a recovery at law. Inhabitants of Bernards Tp. v. Stebbins, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. Ed. 956; Wadsworth v. Wendell, 5 Johns. Ch. (N. Y.) 224; Town of Rutland v. Page, 24 Vt. 181; Inhabitants of Town of Montville v. Haughton, 7 Conn. 543; Sullivan v. Latimer, 38 S. C. 417, 17 S. E. 221. The matter appearing on an instrument must have been intended as a seal. The fact that it appears to be a seal, if it was not so intended, does not make the instrument a specialty. Clement v. Gunhouse, 5 Esp. 83; Blackwell v. Hamilton, 47 Ala. 470. As to presumption that there was a seal on an ancient deed on which no seal appears, see Reusens v. Staples (C. C.) 52 Fed. 91. *See "Deeds," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 99–103.*

[16] 4 Kent, Comm. 452; Warren v. Lynch, 5 Johns. (N. Y.) 239; Tasker v. Bartlett, 5 Cush. (Mass.) 359; Beardsley v. Knight, 4 Vt. 471. *See "Seals," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4–6.*

[17] Pillow v. Roberts, 13 How. 472, 14 L. Ed. 228; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; Hendee v. Pinkerton, 14 Allen (Mass.) 381. *See "Seals," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 4–6.*

[18] Such is the case in California, Connecticut, Florida, Indiana, Illinois, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Virginia, West Virginia, and Wisconsin, and probably in other states. The word "seal," following the signature, has been held a sufficient compliance with such a statute, although not accompanied by any scrawl, stamp, impression, or mark. Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 84 N. E. 198. *See "Seals," Dec. Dig. (Key-No.) §§ 3–5; Cent. Dig. §§ 3–7.*

[19] HACKER'S APPEAL, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861, Throckmorton, Cas. Contracts, 40; Lee v. Adkins, Minor (Ala.) 187; Bertrand v. Byrd, 4 Ark. 195; Hastings v. Vaughn, 5 Cal. 315; Trasher v. Everhart, 8 Gill & J. (Md.) 234; Underwood v. Dollins, 47 Mo. 259; Groner v. Smith, 49 Mo. 318. Whether a mark or character shall be held to be a seal depends on the intention of the executant as shown by the paper. Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; HACKER'S APPEAL, supra. *See "Seals," Dec. Dig. (Key-No.) §§ 3–5; Cent. Dig. §§ 3–7.*

[20] Warren v. Lynch, supra; Hendee v. Pinkerton, supra; Bates v. Boston & N. Y. C. R. Co., 10 Allen (Mass.) 251; Perrine v. Cheeseman, 11 N. J. Law,

recognizing it as a seal.[21] The authorities on this point are not in accord.[22]

One seal may do for any number of parties signing a deed if each one adopts it as his own, but it is always safer to have a seal for each signature.[23]

Delivery

To render an instrument under seal a valid and binding contract, it must be delivered.[24] Delivery may be effected either by actually handing the instrument to the other party himself,[25] or to a stran-

174, 19 Am. Dec. 388. *See "Seals," Dec. Dig. (Key-No.) §§ 3–5; Cent. Dig. §§ 3–7.*

[21] Cromwell v. Tate's Ex'r, 7 Leigh (Va.) 301, 30 Am. Dec. 506; Lee v. Adkins, Minor (Ala.) 187; Glasscock v. Glasscock, 8 Mo. 577; Lewis' Ex'rs v. Overby's Adm'rs, 28 Grat. (Va.) 627; Breitling v. Marx, 123 Ala. 222, 26 South. 206; Echols v. Phillips, 112 Ga. 700, 37 S. E. 977. *See "Seals," Dec. Dig. (Key-No.) §§ 3–5; Cent. Dig. §§ 3–7.*

[22] "The authorities," says Prof. Knowlton in his edition of Anson on Contracts, "are not in accord upon this question; and, while much may depend on the wording of the statute allowing the scroll, still it is believed that, if the device adopted is intended to be a seal, it is to be regarded as such, though the intention be not expressly declared. The presumption is that the parties undertook to execute such an instrument as would be effectual for the purpose intended." Knowlton's Anson, Cont. 55. See Burton v. Leroy, 5 Sawy. 510, Fed. Cas. No. 2,217; Trasher v. Everhart, 3 Gill & J. (Md.) 234; Eames v. Preston, 20 Ill. 389; Brown v. Jordhal, 32 Minn. 135, 19 N. W. 650, 50 Am Rep. 516; Wing v. Chase, 35 Me. 260; Richardson v. Mining Co., 22 Cal., at page 157; Frevall v. Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; 21 Am. & Eng. Enc. Law, 894, note. *See "Seals," Dec. Dig. (Key-No.) §§ 3–5; Cent. Dig. §§ 3–7.*

[23] Ball v. Dunsterville, 4 Term R. 313; Ludlow v. Simond, 2 Caines, Cas. 1, 2 Am. Dec. 291; Pickens v. Rymer, 90 N. C. 282, 47 Am. Rep. 521; Davis v. Burton, 3 Scam. (Ill.) 41, 36 Am. Dec. 511; Yale v. Flanders, 4 Wis. 96; Burnett v. McCluey, 78 Mo., at page 688; Hollis v. Pond, 7 Humph. (Tenn.) 222; In re Hess' Estate, 150 Pa. 346, 24 Atl. 676; Norvell v. Walker, 9 W. Va. 447; Citizens' Building Ass'n v. Cummings, 45 Ohio St. 664, 16 N. E. 841. And see Baltimore Pearl Hominy Co. v. Linthicum, 112 Md. 27, 75 Atl. 737, 136 Am. St. Rep. 383, 20 Ann. Cas. 1325, in which it was held that a contract signed by two parties, but having a seal opposite the signature of only one, was not a contract under seal of the other. *See "Seals," Dec. Dig. (Key-No.) §§ 3–5; Cent. Dig. §§ 3–7.*

[24] Shep. Touch. 57; Cook v. Brown, 34 N. H. 476; Johnson v. Farley, 45 N. H. 505; Overman v. Kerr, 17 Iowa, 490; Fisher v. Hall, 41 N. Y. 421; Duer v. James, 42 Md. 492; Younge v. Guilbeau, 3 Wall. 641, 18 L. Ed. 262; Harris v. Regester, 70 Md. 109, 16 Atl. 386. Obtaining deed by fraud, no delivery. Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323. *See "Deeds," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 116.*

[25] Richmond v. Morford, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; Bogle v. Bogle, 35 Wis. 659. *See "Deeds," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 117–125.*

ger for his benefit,[26] or by words or conduct indicating an intention that the instrument shall become binding though it is retained in the possession of the party executing it.[27] In all cases there must be an intention to deliver the instrument. Merely to part with the possession of it, without intending thereby to render it operative, is not a delivery.[28]

[26] Peavey v. Tilton, 18 N. H. 151, 45 Am. Dec. 365; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617; Douglas v. West, 140 Ill. 455, 31 N. E. 403; Hall v. Hall, 107 Mo. 101, 17 S. W. 811; Williams v. Latham, 113 Mo. 165, 20 S. W. 99; Brown v. Brown, 66 Me. 316; Duer v. James, 42 Md. 492; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; Colyer v. Hyden, 94 Ky. 180, 21 S. W. 868; White v. Pollock, 117 Mo. 467, 22 S. W. 1077, 38 Am. St. Rep. 671. *See "Deeds," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 117–125.*

[27] Xenos v. Wickham, L. R. 2 H. L. 296; Roberts v. Security Co. [1897] 1 Q. B. 111; Ruckman v. Ruckman, 32 N. J. Eq. 259; Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592; Rodemeier v. Brown, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; McCullough v. Day, 45 Mich. 554, 8 N. W. 535; Dunham v. Pitkin, 53 Mich. 504, 19 N. W. 166; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147. Recording of deed by grantor may be presumptive evidence of delivery. Glaze v. Three Rivers, etc., Ins. Co., 87 Mich. 349, 49 N. W. 595; Steele v. Lowry, 4 Ohio, 72, 19 Am. Dec. 581; Kemp v. Walker, 16 Ohio, 118; Tobin v. Bass, 85 Mo. 654, 55 Am. Rep. 393; Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510; Swiney v. Swiney, 14 Lea (Tenn.) 316; Vaughan v. Godman, 108 Ind. 499, 3 N. E. 257; Walton v. Burton, 107 Ill. 54; Moore v. Giles, 49 Conn. 570; Palmer v. Palmer, 62 Iowa, 204, 17 N. W. 463; Whitney v. Hale, 67 N. H. 385, 30 Atl. 417; Holmes v. McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430. The presumption may be rebutted, however, by showing that there was in fact no delivery and acceptance. Hendricks v. Rasson, 53 Mich. 575, 19 N. W. 192; Jefferson County Bldg. Ass'n v. Heil, 81 Ky. 516; Weber v. Christen, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; Brown v. Brown, 167 Ill. 631, 47 N. E. 1046; Fair Haven Marble & Marbleized Slate Co. v. Owens, 69 Vt. 246, 37 Atl. 749. It is very generally held that the mere fact of recording raises no presumption of delivery. Gifford v. Corrigan, 105 N. Y. 223, 11 N. E. 498; Hill v. McNichol, 80 Me. 209, 13 Atl. 883; Barnes v. Barnes, 161 Mass. 381, 37 N. E. 749; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22. *See "Deeds," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 117–125.*

[28] Jordan v. Davis, 108 Ill. 336; Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159; Ireland v. Geraghty (C. C.) 15 Fed. 45. "A delivery may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor, and the person to whom it is delivered, that the deed shall presently become operative and effectual; that the grantor loses all control over it; and that by it the grantee is to become possessed of the estate,—constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." Marshall D. Ewell, in note to Ireland v. Geraghty, supra. And see Bryan v. Wash, 2 Gilman (Ill.) 565; Walker v. Walker, 42 Ill. 311, 89 Am. Dec. 445; Duer v. James, 42 Md. 492; Ruckman v. Ruckman, 32 N. J. Eq. 259; Thatcher v. St. Andrew's Church, 37 Mich. 264; Gregory v. Walker, 38 Ala. 26; Burkholder v. Casad, 47 Ind. 418; Rogers v. Carey, 47 Mo. 235, 4 Am. Rep. 322; Williams v. Schatz, 42 Ohio St. 47; Goodlet v. Kelly, 74 Ala. 213; Davis v. Williams, 57 Miss. 843; Burnett v.

To constitute a good delivery, it is generally held in this country that there must also be an acceptance by the other party,[20] but the acceptance need not always be expressly shown. Where the instrument is clearly beneficial to the other party, its acceptance will be presumed,[30] though, of course, this cannot be so, even when it is beneficial, if acceptance is in fact refused, for a man cannot be compelled to accept even a benefit.[31]

Possession by the grantee or obligee is prima facie evidence of delivery and acceptance.[32]

As the delivery of a contract under seal is what makes it operative, its date is the date of delivery. The date appearing on the instrument is entirely immaterial. It may have no date at all, or an impossible date.[33] In the absence of anything to show the contrary, a deed will be presumed to have been delivered on the day of its date, but delivery at a different time may always be shown by extrinsic evidence.[34]

Same—Escrow

A deed may be delivered to a stranger, to be by him delivered to the other party to it on the fulfillment of certain conditions, in

Burnett, 40 Mich. 361. Where a deed is placed in the hands of a depositary to be delivered to the grantee upon the death of the grantor, or at any other time, but the grantor reserves the right and power to recall it at any time, there is no delivery. Cook v. Brown, supra; Stinson v. Anderson, 96 Ill. 373; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; Brown v. Brown, 66 Me. 316; Duer v. James, 42 Md. 492. *See "Deeds," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 117–125.*

[20] Moore v. Flynn, 135 Ill. 74, 25 N. E. 844; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Corbett v. Norcross, 35 N. H. 99; Leppoc v. Bank, 32 Md. 136; Comer v. Baldwin, 16 Minn. 172 (Gil. 151); Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75. Third parties may acquire rights by attachment or otherwise at any time before acceptance. Bell v. Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205; Parmelee v. Simpson, 5 Wall. 81, 18 L. Ed. 542; Day v. Griffith, 15 Iowa, 104. *See "Deeds," Dec. Dig. (Key-No.) § 64; Cent. Dig. §§ 142–143.*

[30] Peavey v. Tilton, 18 N. H. 151, 45 Am. Dec. 365; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Halluck v. Bush, 2 Root (Conn.) 26, 1 Am. Dec. 60; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Whitney v. Hale, 67 N. H. 385, 30 Atl. 417. *See "Deeds," Dec. Dig. (Key-No.) § 194; Cent. Dig. § 579.*

[31] See Leake, Cont. 81; Butler and Baker's Case, 3 Coke, 26b; St. Louis, I. M. & S. Ry. Co. v. Ruddell, 53 Ark. 32, 13 S. W. 418; Atwood v. Marshall, 52 Neb. 173, 71 N. W. 1064. And see cases cited supra, note 27. *See "Deeds," Dec. Dig. (Key-No.) § 194; Cent. Dig. § 579.*

[32] Keedy v. Moats, 72 Md. 325, 19 Atl. 965; Dawson v. Hall, 2 Mich. 390; Wood v. Chetwood, 44 N. J. Eq. 64, 14 Atl. 21. *See "Deeds," Dec. Dig. (Key-No.) § 208; Cent. Dig. §§ 625–632.*

[33] McMichael v. Carlyle, 53 Wis. 504, 10 N. W. 556. *See "Deeds," Dec. Dig. (Key-No.) §§ 67, 108; Cent. Dig. §§ 145–148, 294–308.*

[34] Faulkner v. Adams, 126 Ind. 459, 26 N. E. 170; Saunders v. Blythe, 112

which case it does not take effect until the condition is fulfilled.[35] This is a delivery in escrow, and during this period the deed is termed an "escrow." Immediately upon fulfillment of the conditions, the deed becomes operative, without actual delivery by the depositary.[36] To constitute an escrow, the delivery to the depositary must be conditional. If it is merely postponed, the delivery to him is an effective delivery to the grantee or obligee, and not a delivery in escrow.[37] A deed thus conditionally delivered must be delivered to a stranger. If it is delivered to the other party, or to his agent, it will take effect at once, in spite of the conditions, on the ground that a delivery in fact outweighs verbal conditions.[38]

There is no delivery, even as an escrow, where the grantor or obligor retains control of the deed with power to withdraw it.[39]

Upon delivery of an escrow, and performance or happening of the condition, the deed becomes effective from the date of the original

Mo. 1, 20 S. W. 319; Smith v. Porter, 10 Gray (Mass.) 66; Battles v. Fobes, 21 Pick. (Mass.) 239. *See "Deeds," Dec. Dig. (Key-No.) § 194; Cent. Dig. § 578.*

[35] Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592. *See "Deeds," Dec. Dig. (Key-No.) §§ 59–61; Cent. Dig. §§ 136–141; "Escrows," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–5.*

[36] Prutsman v. Baker, supra; Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; White Star Line Steamboat Co. v. Moragne, 91 Ala. 610, 8 South. 867. *See "Deeds," Dec. Dig. (Key-No.) §§ 59–61; Cent. Dig. §§ 136–141; "Escrows," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 12, 13.*

[37] Martin v. Flaharty, 18 Mont. 96, 32 Pac. 287, 19 L. R. A. 242, 40 Am. St. Rep. 415. *See "Deeds," Dec. Dig. (Key-No.) §§ 59–61; Cent. Dig. §§ 136–141; "Escrows," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 8.*

[38] Co. Litt. 36a; Dawson v. Hall, 2 Mich. 390; Fairbanks v. Metcalf, 8 Mass. 230; Foley v. Cowgill, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; Stevenson v. Crapnell, 114 Ill. 19, 28 N. E. 379; Miller v. Fletcher, 27 Grat. (Va.) 403, 21 Am. Rep. 356; Braman v. Bingham, 26 N. Y. 483; Cocks v. Barker, 49 N. Y. 110; Graves v. Tucker, 10 Smedes & M. (Miss.) 9; Ordinary of State v. Thatcher, 41 N. J. Law, 403, 32 Am. Rep. 225; Gibson v. Partee, 19 N. C. 530; Williams v. Higgins, 69 Ala. 517; Richmond v. Morford, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; Hubbard v. Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; Campbell v. Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; Dixon v. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193.

In New York it has recently been held that the rule does not apply when the instrument does not relate to real estate, at least where it does not require a seal for its validity. Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600. Quære, whether the rule still prevails in England. Anson, Cont. (8th Ed.) 53; Hudson v. Revett, 5 Bing. 368, 387. *See "Deeds," Dec. Dig. (Key-No.) §§ 59–61; Cent. Dig. §§ 136–141; "Escrows," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 7.*

[39] Prutsman v. Baker, supra; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427; Brown v. Brown, 66 Me. 316. *See "Deeds," Dec. Dig. (Key-No.) §§ 59–61; Cent. Dig. §§ 136–141; "Escrows," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 7.*

delivery; so that, if a bond is delivered as an escrow, and before fulfillment of the condition the obligor and obligee die, yet, on fulfillment of the condition, it becomes an effective bond, and charges the assets of the deceased obligor.[40]

Execution in Blank

A deed executed in blank—that is, completely sealed and delivered, with an omission of a material particular—is void, and cannot be made good by subsequently filling in the blank without a re-execution, or what is equivalent thereto.[41]

Deed Poll and Indenture

Formerly there was a distinction between a deed poll and an indenture. A deed poll was a deed made by one party, and having a polled or smooth-cut edge. Where a deed was made by two or more parties, and contained mutual covenants, it was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called indentures. The distinction, even where it has not been abolished by statute, is no longer of any practical importance; but the terms are still used—the term "deed poll" to signify a deed made by one party only, and the term "indenture," a deed made between two or more parties, all of whom execute it.

CHARACTERISTICS OF CONTRACT UNDER SEAL

33. The chief characteristics of a deed or contract under seal are that:

(a) The recitals are conclusive against the parties. They are said to be estopped thereby.

(b) It merges a prior simple contract.

(c) A right of action is not barred until the lapse of a longer time than in case of simple contracts.

(d) No consideration is necessary.

EXCEPTIONS—(1) Contracts in partial restraint of trade, though under seal, require consideration.

[40] Leake, Cont. 79.

[41] Leake, Cont. 79; Powell v. Duff, 3 Camp. 181; Weeks v. Maillardet, 14 East, 568. Blank for sum of money afterwards filled in. Hudson v. Revett, 5 Bing. 368. Since authority to execute a deed must be conferred by instrument under seal, in strictness authority to fill a blank in a deed otherwise executed cannot be conferred by parol. Many courts, however, to-day recognize the validity of a deed in which blanks have been so filled by an agent authorized by parol. See Tiff. Ag. 23. *See "Deeds," Dec. Dig. (Key-No.) § 32; Cent. Dig. § 64.*

(2) Where there was a consideration, it may be shown to have been illegal or immoral.

(3) Courts of equity will not specifically enforce a deed without consideration.

(4) By statute in some states the distinction between sealed and unsealed instruments is abolished, while in others a seal is merely declared presumptive, but rebuttable, evidence of a consideration.

Estoppel by Deed

Statements made in a simple contract, though strong evidence against the parties thereto, are not absolutely conclusive against them, and may be contradicted. Statements made in a deed, however, are absolutely conclusive against the parties to the deed or their privies in any legal proceedings between them taken upon the deed.[42] "The principle is that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."[43] Such a prohibition to deny facts is termed an "estoppel by deed." The statements, however, must not be of immaterial matters, or matters by way of general recital, and the deed must be valid.[44] A recital of the amount or receipt of the consideration does not preclude evidence of the actual consideration or a recovery of the amount due;[45] but in the absence of mistake, fraud, or il-

[42] WATKINS v. ROBERTSON, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, Throckmorton Cas. Contracts, 43; Carver v. Jackson, 4 Pet. 1, at page 83, 7 L. Ed. 761; Jackson v. Parkhurst, 9 Wend. (N. Y.) 209; Smith v. Burnham, 9 Johns. (N. Y.) 306; Cutler v. Dickinson, 8 Pick. (Mass.) 386; Dobbins v. Cruger, 108 Ill. 188; City of Ottawa v. Bank, 105 U. S. 342, 26 L. Ed. 1127; Gerry v. Stimson, 60 Me. 186; Thompson v. Smith, 96 Mich. 258, 55 N. W. 886; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130; Moore v. Earl, 91 Cal. 632, 27 Pac. 1087; Chapman v. Persinger's Ex'x, 87 Va. 581, 13 S. E. 549; Billingsley v. Harris, 79 Wis. 103, 48 N. W. 108; Metropolitan Ins. Co. v. Bender, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708; Rogers v. Bollinger, 59 Ark. 12, 26 S. W. 12; Balue v. Taylor, 136 Ind. 368, 36 N. E. 269; Johnston v. Oliver, 51 Ohio St. 6, 36 N. E. 458; Willis v. Terry (Ky.) 24 S. W. 621. *See "Contracts," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 225–230; "Estoppel," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 18–25.*

[43] Bowman v. Taylor, 2 Adol. & E. 278. *See "Contracts," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 225–230; "Estoppel," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 18–25.*

[44] Wallace's Lessee v. Miner, 6 Ohio, 367; Zimmler v. Water Co., 57 Cal. 221. *See "Contracts," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 225–230; "Estoppel," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 18–25.*

[45] Wilkinson v. Scott, 17 Mass. 249; Irvine v. McKeon, 23 Cal. 472; Witbeck v. Waine, 16 N. Y. 532; White v. Miller, 22 Vt. 380; Thayer v. Viles, 23 Vt. 494; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103;

legality,[46] such recital may not be contradicted for the purpose of avoiding the instrument.[47]

Recitals in a deed are, of course, conclusive only against the parties thereto and their privies, or those claiming under or through them. They do not work an estoppel as between strangers, nor as between a stranger and a party to the deed.[48]

Merger

Where, after making a simple contract, the parties enter into an identical engagement under seal, the simple contract is merged in the deed, and becomes extinct; one cannot have, in respect of the same demand, a coexisting remedy, by proceeding both on covenant and on simple contract.[49] This extinction is called "merger." The contracts, however, must be the same—that is, the subject-matter must be identical—and they must be between the same parties.[50]

Limitation of Actions

A right of action arising out of a simple contract is barred by the lapse of a shorter period of time than a right of action arising out of a contract under seal. The respective periods vary somewhat under the statutes of the different states, but generally an action

Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Smith v. Arthur, 110 N. C. 400, 15 S. E. 197; Union Mut. Ins. Co. v. Kirchoff, 133 Ill. 368, 27 N. E. 91. *See "Evidence," Dec. Dig. (Key-No.) § 419; Cent. Dig. §§ 1912–1928; "Contracts," Cent. Dig. §§ 229, 408.*

[46] See post, p. 168.

[47] WATKINS v. ROBERTSON, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, Throckmorton Cas. Contracts, 43. *See "Evidence," Dec. Dig. (Key-No.) § 419; Cent. Dig. §§ 1912–1928.*

[48] Thomason v. City of Dayton, 40 Ohio St. 63; Allen v. Allen, 45 Pa. at page 473; Brittain v. Daniels, 94 N. C. 781; Reeves v. Brayton, 36 S. C. 384, 15 S. E. 658. *See "Estoppel," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 61, 62.*

[49] Price v. Moulton, 10 C. B. 561; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Leonard v. Hughlett, 41 Md. 380; Curson v. Monteiro, 2 Johns. (N. Y.) 308; Rhoads v. Jones, 92 Ind. 328; Robbins v. Ayres, 10 Mo. 538, 47 Am. Dec. 125; McNaughten v. Partridge, 11 Ohio, 223, 28 Am. Dec. 731; Burnes v. Allen, 31 N. C. 370; Berry v. Bacon, 28 Miss. 318; Griswold v. Eastman, 51 Minn. 189, 53 N. W. 542; Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239. But see Shelby v. Railroad Co., 143 Ill. 385, 32 N. E. 438; Saville v. Chalmers, 76 Iowa, 325, 41 N. W. 30; post, p. 599. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[50] Hutchins v. Hebbard, 34 N. Y. 24; Day v. Leal, 14 Johns. (N. Y.) 404 If the contract under seal is expressly received as collateral security for performance of the simple contract, or if it merely recognizes the debt, and fixes the mode of ascertaining its amount, there is no merger. Marryat v. Marryat, 28 Beav. 224; Van Vleit v. Jones, 20 N. J. Law, 340, 43 Am. Dec. 633; Rees v. Logsdon, 68 Md. 93, 11 Atl. 708; Brengle v. Bushey, 40 Md. at page 147, 17 Am. Rep. 586; Charles v. Scott, 1 Serg. & R. (Pa.) 294; post, p. 599 *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

on a simple contract is barred in six years or less, while an action on a sealed instrument is not barred if brought within ten, or, in some jurisdictions, twenty, years.

Gratuitous Promises

At common law, a gratuitous promise, or promise for which the promisor obtains no consideration, is binding if made under seal,[51] but is absolutely void in the absence of a seal. This characteristic of contracts under seal is often accounted for on the ground that their solemnity imports a consideration, but the supposition is historically untrue. At common law, even if it were allowable to show that there is no consideration for a deed, and if the obligee or grantee were to admit that there was no consideration, it could not affect the validity of the deed. It derives its validity solely from its form. The doctrine of consideration is of a much later date than that at which a contract under seal was in full efficacy, an efficacy which it owed entirely to its form.[52]

Same—Exceptions at Common Law

Even at common law a contract in partial restraint of trade, though made under the formality of a seal, must be supported by a consideration.[53]

And as a general rule, if there be a consideration for a deed, it is open to the party sued on the contract to show that the consideration was illegal or immoral, in which case the deed is void.[54]

Same—Exceptions in Equity

The idea of consideration as a necessary element of contract has always met with peculiar favor in courts of chancery. Equity will

[51] 2 Bl. Comm. 446; Cooch v. Goodman, 2 Q. B. 580; Fallowes v. Taylor, 7 Term R. 475; McMillan v. Ames, 33 Minn. 257, 22 N. W. 612; Dorr v. Munsell, 13 Johns. (N. Y.) 430; Van Valkenburgh v. Smith, 60 Me. 97; Harris v. Harris' Ex'r, 23 Grat. (Va.) 737; Wing v. Peck, 54 Vt. 245; Page v. Trufant, 2 Mass. 159, 3 Am. Dec. 41; State v. Gott, 44 Md. 341; Edelin v. Sanders, 8 Md. 118; Day v. Davis, 64 Miss. 253, 8 South. 203. *See "Contracts," Dec. Dig. (Key-No.) §§ 47, 48; Cent. Dig. §§ 220, 221, 256–258, 406.*

[52] Anson, Cont. (4th Ed.) 49.

[53] Mallan v. May, 11 Mees. & W. 665; Palmer v. Stebbins, 8 Pick. (Mass.) 188, 15 Am. Dec. 204; Wiley v. Baumgardner, 97 Ind. 68, 49 Am. Rep. 427; Keeler v. Taylor, 53 Pa. 467, 91 Am. Dec. 221. Of course this does not apply to contracts that are to such an extent in restraint of trade as to be contrary to public policy. Such contracts are void, as being illegal, without regard to the question of consideration. Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119. See post, p. 384. *See "Contracts," Dec. Dig. (Key-No.) §§ 47, 48, 116; Cent. Dig. §§ 220, 221, 406, 542.*

[54] Collins v. Blantern, 1 Smith, Lead. Cas. 369; Logan v. Plummer, 70 N. C. 388. And see Paxton v. Popham, 9 East, 421. *See "Contracts," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 681–700.*

not grant its peculiar remedy of specific performance, nor exercise its peculiar power to correct mistakes and reform contracts, where the promises are without consideration, even though they are under seal.[55] So, also, in the exercise of its peculiar power of declaring a contract void and setting it aside on the ground of fraud and undue influence, it will look into the question of consideration, and absence of consideration will be regarded as corroborative evidence of fraud and undue influence.[56]

Even a court of equity, however, will not relieve a person from his obligation under a sealed contract, simply for want or failure of consideration.[57]

Same—Statutory Changes in the Law

In some of the states the common-law rules in relation to sealed instruments have been either altogether abolished or greatly modified by statute. In some states it is declared that any written instrument, whether under seal or not, is presumptive evidence of a consideration, and all distinctions between sealed and unsealed instruments are expressly abolished, and in these states want or failure of consideration may always be shown, even though the instrument is sealed.[58]

In other states the distinction between sealed and unsealed instruments is not altogether abolished; but it is declared that the seal shall only be presumptive evidence of a sufficient considera-

[55] Smith v. Wood, 12 Wis. 425; Bayler v. Com., 40 Pa. 37, 80 Am. Dec. 551; Black v. Cord, 2 Har. & G. (Md.) 100; Keffer v. Grayson, 76 Va. 517, 44 Am. Rep. 171; Snyder v. Jones, 38 Md. 542; Anon., 12 Mod. 603. But see infra, note 57. *See "Specific Performance," Dec. Dig. (Key-No.) §§ 49, 50; Cent. Dig. §§ 140–152.*

[56] Hazard v. Irwin, 18 Pick. (Mass.) 95; Goudy v. Gebhart, 1 Ohio St. 262; Mortland v. Mortland, 151 Pa. 593, 25 Atl. 150. *See "Cancellation of Instruments," Dec. Dig. (Key-No.) §§ 4, 5; Cent. Dig. §§ 1–3.*

[57] Doughty v. Miller, 50 N. J. Eq. 529, 25 Atl. 153. And see WATKINS v. ROBERTSON, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, Throckmorton Cas. Contracts, 43, where it is said, per Cardwell, J.: "There is much conflict among the authorities as to whether courts of equity will decree specific performance of an executory contract or covenant because it is under seal, where it is not also supported by an actual valuable consideration, and many of them take the negative view; but, undoubtedly, this is to be ascribed to the fact that the ancient rule of the common law, that a seal conclusively imports a consideration, has been repealed or modified by statute in most of the states, and text-writers in citing cases fail in many instances to make allowance for this fact." *See "Cancellation of Instruments," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 1–5; "Deeds," Cent. Dig. § 210.*

[58] There are such statutes as this in California, Kentucky, Indiana, Iowa, Kansas, Nebraska, Washington, and probably in other states. *See "Seals," Dec. Dig. (Key-No.) §§ 1, 2; Cent. Dig. §§ 1, 2.*

tion, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed.[59] The New Jersey court, in an action on a sealed note presented by a father to his daughter as a gift, held that such a statute as this did not abolish all distinctions between simple contracts and specialties, but merely established new rules of evidence, for the purpose of allowing parties to an instrument under seal to show that there was no consideration, where they intended that there should be a consideration; and that it did not make it impossible for parties intentionally to enter into binding gratuitous promises.[60]

NECESSITY FOR CONTRACT UNDER SEAL

34. A contract under seal is necessary at common law—

(a) Where the promise is without consideration.

(b) Formerly, corporations could only contract under seal, with some few exceptions; but with us they can make contracts which they have the power to enter into in the same manner as a natural person, unless restricted by charter.

(c) Conveyances of land are in most jurisdictions required to be under seal.

It is usually a matter of choice with persons whether they will contract by word of mouth or simply in writing, or in writing under seal; but in some cases, either at common law or by statute, it is necessary to employ the form of a deed.

At Common Law—Gratuitous Promises—Contracts with Corporations

There are two cases in which the old common law required that a contract should be made under seal, namely: (1) Where the contract was not founded on a consideration; and (2) where it was made by a corporation.

A gratuitous promise, or contract for which there is no consideration, must be made by deed; otherwise it will be void. This has already been shown to furnish a distinguishing characteristic between contracts under seal and simple contracts. It is unnecessary to say more on the subject.

Under the old common law the rule was that, with a few exceptions, a corporation could only contract under the corporate seal,

[59] New York and New Jersey.

[60] Aller v. Aller, 40 N. J. Law, 446. *See "Contracts," Dec. Dig. (Key-No.) § 48; Cent. Dig. § 406.*

but this rule has long been repudiated in this country, and now a corporation, unless restricted by its charter or by statute, may contract in the same manner as a natural person. This will be more fully explained in another connection.[61]

Conveyances of Land

At common law, a conveyance of land was not required to be by deed, but in most jurisdictions this is necessary. It is not necessary to go into the question, as it belongs more properly to the subject of real property. Sometimes a seal is made necessary by statute in the case of particular contracts.

[61] Post, p. 241.

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CHAPTER IV

CONTRACTS REQUIRED TO BE IN WRITING—STATUTE OF FRAUDS

35–36. In General of Requirement of Writing.
37. Statute of Frauds—In General.
38. Contracts within Section 4.
39. Promise by Executor or Administrator.
40. Promise to Answer for Debt, Default, or Miscarriage of Another.
41. Agreement in Consideration of Marriage.
42. Contract or Sale of Lands.
43. Agreement not to be Performed within One Year.
44–49. Form Required.
50–51. Effect of Noncompliance.
52–55. Contracts within Section 17.
56. Acceptance and Receipt.
57–58. Earnest and Part Payment.
59. Form Required.
60. Effect of Noncompliance.

IN GENERAL OF REQUIREMENT OF WRITING

35. At common law, bills of exchange and promissory notes must be in writing.

36. By statute, writing is in some states declared necessary for the following contracts:

(a) Acceptance of a bill of exchange or other order for the payment of money.

(b) Acknowledgment of a debt barred by the statute of limitations.

(c) New promise by infant after attaining his majority.

(d) By the statute of frauds writing is necessary in certain specified contracts.

In the preceding chapter we have dealt with those contracts which acquire validity by reason of their form alone, and we now pass to simple or parol contracts, which depend for their validity upon the presence of consideration. As we have seen, however, there are some simple contracts which, while not in the solemn form of a deed or record, are required by law to be in writing, and which, therefore, depend not only on the presence of consideration, as in the case of other simple or parol contracts, but also on their form. These contracts, in so far as their form is concerned, we shall deal with in the present chapter.

Independently of any requirement of law as to form, an agreement which might be made orally may require writing, because of the intention of the parties not to be bound until their agreement is reduced to writing. We have considered the question in treating of offer and acceptance.[1]

Common Law

The only requirement of form for simple contracts which can be said to exist independently of statute is in the case of negotiable bills of exchange and promissory notes. A bill of exchange is a kind of contract which originated in the custom of merchants, and which is designed to take the place of money, to some extent, as a circulating medium; and from its very nature and use as a negotiable instrument it must be in writing. The same may be said of promissory notes, which, whether by statute or the law merchant, are negotiable, and stand on the same footing as bills of exchange. Besides the mere necessity of writing, these instruments are required by law to be in a particular form, but this is matter more properly for a work on negotiable instruments.

Statutory Requirements of Form

The statutory requirements of form in simple contracts are mainly to be found in the statute of frauds, but before going into these we must notice some others which are not so general.

At common law, a bill of exchange or other order for the payment of money might be accepted orally,[2] but now by statute in England,[3] and in most of the states in this country,[4] the acceptance is required to be in writing.

At common law, a contract of insurance need not necessarily be evidenced by a written policy.[5] In some of the states, however, statutes have been enacted prescribing particular forms for such contracts.[6]

[1] Ante, pp. 35, 52.

[2] Norton, B. & N. (3d Ed.) 91, 99.

[3] Bills of Exchange Act, § 17.

[4] Uniform Negotiable Instruments Law, § 132 (220), now adopted in more than forty states.

[5] Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291; Sanborn v. Insurance Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; First Baptist Church v. Insurance Co., 19 N. Y. 305; Ellis v. Insurance Co., 50 N. Y. 402, 10 Am. Rep. 495; Nebraska & I. Ins. Co. v. Selvers, 27 Neb. 541, 43 N. W. 351; Zell v. Insurance Co., 75 Wis. 521, 44 N. W. 828; Wooddy v. Insurance Co., 31 Grat. (Va.) 362, 31 Am. Rep. 732; Putnam v. Insurance Co., 123 Mass. 324, 25 Am. Rep. 98; Hardwick v. Insurance Co., 20 Or. 547, 26 Pac. 840; Stickley v. Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838; Howard Ins. Co. v. Owen's Adm'r, 94 Ky. 197, 21 S. W. 1037. *See "Insurance," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 203–209.*

[6] See Vance on Insurance, p. 29.

In some of the states an acknowledgment of a debt barred by the statute of limitations is required to be in writing, and signed by the debtor, in order to take the debt out of the statute.[7]

In some states, a promise by a person, after becoming of age, to pay a debt contracted during his infancy, is required by statute to be in writing.[8]

By act of congress assignments of patents and copyrights are required to be in writing.[9]

In most, if not in all, the states there are statutes regulating the mode of conveying land, and requiring writing, together with other formalities. In some states a deed is required. This, however, is a matter more properly for a work on real property.[10]

STATUTE OF FRAUDS

The famous statute of frauds and perjuries, 29 Car. II. c. 3, was enacted in England in 1677,[11] and, as stated in its recital, had for its object the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."

The original statute contains two sections—the fourth and the seventeenth—which affect the form of certain simple contracts.[12]

These sections have been substantially followed by the statutes of most of our states, but in some states there are material variations. These variations will be noticed as we go along.

As the seventeenth section differs materially from the fourth, it will be better to treat them separately. In doing so we shall consider (1) the nature of the contracts specified, (2) the form required, and (3) the effect of failure to comply with the provisions of the statute.

STATUTE OF FRAUDS—IN GENERAL

37. The statute does not apply to—
   (a) Contracts created by law.
   (b) Instruments created under, and deriving their obligation from, special statutes.
   (c) Executed contracts.

[7] 25 Cyc. 1350.
[8] Post, p. 207.
[9] Rev. St. U. S. §§ 4898, 4955 (U. S. Comp. St. 1901, pp. 3387, 3407).
[10] See Minor and Wurts on Real Property, p. 680.
[11] 8 St. at Large, 405.
[12] For the provisions of sections 4 and 17, see post, pp. 80, 121.

Before taking up in turn the special contracts specified in these sections, it is proper to state the kinds of contract generally to which the statute does not apply.

In the first place, it applies only to contracts made in fact; it does not include so-called contracts created by law, or quasi contracts. If a duty is imposed by law to pay money or perform other duties, without an agreement or promise in fact, no writing is necessary to support an action on the implied assumpsit.[13]

Nor does the statute apply to such instruments as are created under, and derive their obligation from, special statutes, without the acceptance or assent of the party for whose ultimate benefit they are given,—as in the case of an undertaking on appeal, the requisites of which are prescribed by a special statute.[14]

Nor does the statute have any effect where the contract has been executed on both sides, for the purpose of the statute is to exclude parol evidence of the contracts within their provisions, and not to prohibit execution of oral contracts. It applies to executory contracts only.[15] We shall see, in treating of the particular kinds of contracts, that under some circumstances part performance may take them out of the statute.

Executory oral agreements, modifying prior written contracts, are within the statute;[16] and they may not be proved, for the admission

[13] Goodwin v. Gilbert, 9 Mass. 510; Arnold v. Garst, 16 R. I. 4, 11 Atl. 167; Pike v. Brown, 7 Cush. (Mass.) 133; Sage v. Wilcox, 6 Conn., at page 84; Smith v. Bradley, 1 Root (Conn.) 150; Howard v. Whitt (Ky.) 2 S. W. 776; post, p. 119, note 90. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 124, 125; Cent. Dig. §§ 275–277½.*

[14] Thompson v. Blanchard, 3 N. Y. 335; Doolittle v. Dininny, 31 N. Y. 350. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 121; Cent. Dig. §§ 140, 269.*

[15] STONE v. DENNISON, 13 Pick. (Mass.) 1, 23 Am. Dec. 654, Throckmorton, Cas. Contracts, 54; Lord Bolton v. Tomlin, 5 Adol. & El. 856; Brown v. Trust Co., 117 N. Y. 266, 22 N. E. 952; Schultz v. Noble, 77 Cal. 79, 19 Pac. 182; Swanzey v. Moore, 22 Ill. 63, 74 Am. Dec. 134; James v. Morey, 44 Ill. 352; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Webster v. Le Compte, 74 Md. 249, 22 Atl. 232; Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058; Pireaux v. Simon, 79 Wis. 392, 48 N. W. 674; Anderson School Tp. v. Milroy Lodge, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Lagerfelt v. McKie, 100 Ala. 430, 14 South. 281; Hatton v. Cale, 152 Iowa, 485, 132 N. W. 1101 (contract for digging and use of ditch through land of another); James v. Manning, 79 Kan. 830, 101 Pac. 628; Kuhn v. Poole, 27 Okl. 534, 112 Pac. 962 (contract for construction and use of party wall). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 334–341.*

[16] Stead v. Dawber, 10 Adol. & El. 57; Marshall v. Lynn, 6 Mees. & W. 109; Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554; Hill v. Blake, 97 N. Y. 216; Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165; Burns v. Real-Estate Co., 52 Minn. 81, 53 N. W. 1017; Walter v. Victor G. Bloede Co., 94 Md. 80, 50

of such evidence could only be for the purpose of showing a contract part of which is not in writing.[17] Where such agreements have been executed, however, they may be proved, for the purpose of the statute is only to prevent the enforcement of executory oral agreements.[18]

So a subsequent oral agreement for the rescission or waiver of the original written contract is valid, where it is clearly proved and nothing further remains to be done by the parties for its complete execution.[19]

SAME—CONTRACTS WITHIN SECTION 4

38. The fourth section of the English statute, which has been substantially followed in most of the states, enacts that "No action shall be brought,

(a) "Whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate;

(b) "Or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person;

(c) "Or to charge any person upon any agreement made upon consideration of marriage;

(d) "Or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them;

(e) "Or upon any agreement that is not to be performed within the space of one year from the making thereof;

"Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." [20]

Atl. 433. Contra: Cummings v. Arnold, 8 Metc. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. (Mass.) 31; Whittier v. Dana, 10 Allen (Mass.) 326; Negley v. Jeffers, 28 Ohio St. 90. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 283, 284.*

[17] Bonicamp v. Starbuck, 25 Okl. 483, 106 Pac. 839. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 283, 284.*

[18] Blake v. J. Neils Lumber Co., 111 Minn. 513, 127 N. W. 450; Gerard-Fillio Co. v. McNair, 68 Wash. 321, 123 Pac. 462. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 283, 284.*

[19] Warden v. Bennett, 145 Ky. 325, 140 S. W. 538; Gerard-Fillio Co. v. McNair, 68 Wash. 321, 123 Pac. 462. And see post, p. 533. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 140; Cent. Dig. §§ 156, 342.*

[20] 8 St. at Large, 405.

SAME—PROMISE BY EXECUTOR OR ADMINISTRATOR

39. The statute applies only to promises—

(a) To answer for debts or liabilities of the deceased, and

(b) To answer for them out of the property of the promisor.

An executor or administrator may sue or be sued upon obligations devolving upon him as the representative of the deceased, and he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate; but in neither case is he bound to pay anything out of his own pocket. His liabilities are limited by the assets of the deceased. He may, however, if he chooses, to save the credit of the deceased, or for any other reason, make promises to answer for damages or pay debts—which is included in the expression, "answer damages"—out of his own estate; but, in order that the promise may be binding on him, it must be in writing, signed by him or his agent.

The statute only applies to promises to answer for debts or liabilities of the decedent. It does not apply to original undertakings by the executor or administrator, and a promise, therefore, by an executor to pay the heir money if he will forbear further opposition to the probate of the will, is not within the statute.[21] Nor does it apply to promises to pay debts of the decedent out of the assets of the estate.[22]

SAME—PROMISE TO ANSWER FOR DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER

40. The following points should be noted:

(a) The debt, default, or miscarriage must be that of "another person," and, therefore, for the statute to apply,

(1) There must be either a present or prospective primary liability of a third person for which the promisor agrees to answer. He must not himself be or become primarily liable.

[21] BELLOWS v. SOWLES, 57 Vt. 164, 52 Am. Rep. 118, Throckmorton, Cas. Contracts, 56. And see Fehlinger v. Wood, 134 Pa. 517, 19 Atl. 746; Wales v. Stout, 115 N. Y. 638, 21 N. E. 1027; Mackin v. Dwyer, 205 Mass. 472, 91 N. E. 893; Blake v. Robinson, 129 Iowa, 196, 105 N. W. 401. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 7–12; Cent. Dig. §§ 7–12.*

[22] Stebbins v. Smith, 4 Pick. (Mass.) 97; Pratt v. Humphrey, 22 Conn. 317. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 7–12; Cent. Dig. §§ 7–12.*

(2) The liability of the third person, therefore, must continue.

(b) A promise which contemplates payment out of the debtor's property in the hands of the promisor is not within the statute.

(c) Nor is a promise to the debtor to pay his debt.

(d) Nor, according to the weight of authority, does the statute apply where the leading object of the promisor is to subserve some purpose of his own, and his promise is merely incidental.

(e) By the weight of authority a contract of indemnity is not within the statute, although if the promise is to answer for another's debt, it is within the statute, notwithstanding it is in the form of a contract of indemnity.

"Debt, Default, or Miscarriage"

The words "debt, default, or miscarriage" include all liabilities of a third person, however they may arise, and therefore include liabilities arising out of a wrong or tort, as well as those arising out of contract.[23] They also include prospective as well as existing liabilities. "If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the statute of frauds, precisely as it would be if the liability existed when the promise was made." [24] Nor does it matter that the debt or obligation of the third party is voidable by him.[25]

"Of Another Person"

The promise contemplated by the statute is a promise to answer for the debt, default, or miscarriage of "another person;" or, in other words, a contract of guaranty or suretyship. The statute does not apply to original promises or undertakings, though the benefit accrues to another than the promisor. There must be three par-

[23] Kirkham v. Marter, 2 Barn. & Ald. 613, 18 E. C. L. 212, 21 Rev. Rep. 416; Turner v. Hubbell, 2 Day (Conn.) 457, 2 Am. Dec. 115; Mountstephen v. Lakeman, L. R. 7 Q. B. 202. A promise, however, to give notice to another before settling with a third party who is indebted to the promisee is not within the statute. Towne v. Grover, 9 Pick. (Mass.) 306. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 14; Cent. Dig. § 14.*

[24] Mead v. Watson, 57 Vt. 426. And see Matson v. Wharam, 2 Term R. 80; Matthews v. Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 14; Cent. Dig. § 14.*

[25] Dexter v. Blanchard, 11 Allen (Mass.) 365; Brown v. Farmers' & Merchants' Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359 and note. Contra, King v. Summitt, 73 Ind. 312, 38 Am. Rep. 145. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 14, 15; Cent. Dig. §§ 14–16.*

ties in contemplation,—a person who is actually or prospectively liable to another person, and a third person who promises the creditor to answer for the debt or liability; or, in other words, a creditor, a principal debtor, and a guarantor of the debt, or surety.[26] This distinction is well illustrated by an old case in which it was held that a promise to pay if the promisee will lend money to a third person is within the statute, but a promise to pay if the promisee will pay money to a third person is without.[27] Although there is considerable conflict among the courts in their construction of this clause of the statute, the following rules for determining whether a contract comes within it are established by the weight of authority:

(a) There must be either a present or prospective liability of a third person for which the promisor agrees to answer.[28] If the promisor becomes himself primarily, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person.[29] If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods, and I will pay," or "I will see you paid," and credit is given to him alone, he is himself the buyer, and the undertaking is original.[30] In other words, whether the promise in such a case is

[26] NUGENT v. WOLFE, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291, Throckmorton, Cas. Contracts, 62. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 21; Cent. Dig. § 33.*

[27] Butcher v. Andrews, Comberbach, 473 (Holt, C. J.). *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

[28] Mease v. Wagner, 1 McCord (S. C.) 395. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 15, 16.*

[29] Hargreaves v. Parsons, 13 Mees. & Wels. 561; Baldwin v. Hiers, 73 Ga. 739; Morris v. Osterhout, 55 Mich. 262, 21 N. W. 339; De Witt v. Root, 18 Neb. 567, 26 N. W. 360. Where an agent has become liable to his principal by lending money contrary to instructions, his guaranty of the loan is not within the statute. Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033. A promise by a married woman to pay her parent for her support was held a promise to pay her husband's debt. Perkins v. Westcoat, 3 Colo. App. 338, 33 Pac. 139. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 18, 19.*

[30] LARSON v. JENSEN, 53 Mich. 427, 19 N. W. 130, Throckmorton, Cas. Contracts, 60; Hartley v. Varner, 88 Ill. 561; Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Greene v. Burton, 59 Vt. 423, 10 Atl. 575; Geelan v. Reid, 22 Ill. App. 165; Higgins v. Hallock, 60 Hun, 125, 14 N. Y. Supp. 550; Boston v. Farr, 148 Pa. 220, 23 Atl. 901; Crowder v. Keys, 91 Ga. 180, 16 S. E. 986; Burns v. Bradford-Kennedy Lumber Co., 61 Wash. 276, 112 Pac. 359. The same is true where a person says: "If I am to do certain work for M., I must be assured of payment by some one," and the person addressed says, "Do it, and I will see you paid." Mountstephen v. Lakeman,

within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original;[21] but it is collateral if any credit was given to the other party.[22] So an oral acceptance of a bill of exchange or other order for the payment of money is not within the statute, for the reason that the acceptor becomes the party primarily liable on the instrument.[23]

(b) Even though there is an existing liability of a third person for which the promisor undertakes to answer, still the promise is not within the statute if the terms are such that it effects an extinguishment of such liability; in other words, the liability of the original debtor must continue. A promise to pay another's debt in consideration of the creditor's doing something which will extinguish his claim against the debtor, and release him absolutely,

L. R. 7 H. L. 17. And see cases cited above and in the following notes. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 18, 19.*

[21] Chase v. Day, 17 Johns. (N. Y.) 114; Hartley v. Varner, 88 Ill. 561; Myer v. Grafflin, 31 Md. 350, 100 Am. Dec. 66; Grant v. Wolf, 34 Minn. 82, 24 N. W. 289; Ellis v. Murray, 77 Ga. 542; Hagadorn v. Stronach Lumber Co., 81 Mich. 50, 45 N. W. 650; Peyson v. Conniff, 32 Neb. 269, 49 N. W. 340; Mackey v. Smith, 21 Or. 598, 28 Pac. 974; Herendeen Mfg. Co. v. Moore, 66 N. J. Law, 74, 48 Atl. 525; Lusk v. Throop, 189 Ill. 127, 59 N. E. 529. Where defendant gave plaintiff directions to give his (defendant's) subcontractors material, and charge it to them, which was done, and every month he (defendant) would pay the bill, it was held not to show that credit was given the subcontractors, and that the undertaking was original. Maurin v. Fogelberg, 37 Minn. 23, 32 N. W. 858, 5 Am. St. Rep. 814. And see Owen v. Stevens, 78 Ill. 462; Schoenfeld v. Brown, 78 Ill. 487. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 35–42½.*

[22] Birkmyr v. Darnell, 2 Ld. Raym. 1085, Mod. 248, 3 Salk. 27, Holt 606, 92 Eng. Reprint, 219, 1 Sm. L. C. (11th Ed.) 299; Welch v. Marvin, 36 Mich. 59; Cahill v. Bigelow, 18 Pick. (Mass.) 369; Norris v. Graham, 33 Md. 56; Northern Cent. Ry. Co. v. Prentiss, 11 Md. 119; Aldrich v. Jewell, 12 Vt. 125, 36 Am. Dec. 330; Matthews v. Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247; Baldwin v. Hiers, 73 Ga. 739; Blank v. Dreher, 25 Ill. 331; Langdon v. Richardson, 58 Iowa, 610, 12 N. W. 622; Bugbee v. Kendricken, 130 Mass. 437; Mead v. Watson, 57 Vt. 426; Studley v. Barth, 54 Mich. 6, 19 N. W. 568; Robertson v. Hunter, 29 S. C. 9, 6 S. E. 850; Harris v. Frank, 81 Cal. 280, 22 Pac. 856; Rottmann v. Pohlmann, 28 Mo. App. 399; Clark v. Jones, 87 Ala. 474, 6 South. 362; Waters v. Shafer, 25 Neb. 225, 41 N. W. 181; Swaboda v. Throgmorton-Bruce Co., 88 Ark. 592, 115 S. W. 380; Johnson v. Bank, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893, and note; Wood v. Dodge, 23 S. D. 95, 120 N. W. 774; Peele v. Powell, 156 N. C. 553, 73 S. E. 234. The question whether the promise is original or collateral is usually one for the jury, under instructions from the court. Johnson v. Bank, supra; McGowan Commercial Co. v. Midland Coal & Lumber Co., 41 Mont. 211, 108 Pac. 655. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 35–42½.*

[23] Edward Hines Lumber Co. v. Anderson, 141 Ill. App. 527. See ante, p. 77. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 43, 44.*

need not be in writing.[34] To take the promise out of the statute, the original debtor's release must be absolute. If the creditor may still hold him liable at his option, the promise must be in writing.[35] Novations fall within this class of agreements.

(c) The promise must contemplate payment by the promisor out of his own property, or, at least, not out of the property of the debtor, from which, or from the proceeds of which, the promisor is under a duty to pay, or is authorized to pay; for in such a case the payment is, in effect, by the debtor.[36] The statute has no application to "cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claims of a particular creditor of the debtor. The promise, in such case, is an original promise, and the property placed in his hands is

[34] Bird v. Gammon, 2 Bing. N. C. 883; Anstey v. Marden, 1 B. & P. New Rep. 124; Goodman v. Chase, 1 Barn. & Ald. 297; Peeters v. Lamborn, 43 Ohio St. 144, 1 N. E. 513; Andre v. Bodman, 13 Md. 241, 71 Am. Dec. 628; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Runde v. Runde, 59 Ill. 98; Green v. Solomon, 80 Mich. 234, 45 N. W. 87; Carlisle v. Campbell, 76 Ala. 247; Palmer v. Witcherly, 15 Neb. 98, 17 N. W. 364; Eden v. Chaffee, 160 Mass. 225, 35 N. E. 675; Hamlin v. Drummond, 91 Me. 175, 39 Atl. 551; Ferst v. Bank, 111 Ga. 229, 36 S. E. 778; Hanson v. Nelson, 82 Minn. 220, 84 N. W. 742. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 47, 48.*

[35] Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Waggoner v. Gray's Adm'rs, 2 Hen. & M. (Va.) 612; Pfaff v. Cummings, 67 Mich. 148, 34 N. W. 281; Gray v. Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691; Murto v. McKnight, 28 Ill. App. 238; Miller v. Lynch, 17 Or. 61, 19 Pac. 845; Brant v. Johnson, 46 Kan. 389, 26 Pac. 735; Riegelman v. Focht, 141 Pa. 380, 21 Atl. 601, 23 Am. St. Rep. 293; Greene v. Latcham, 2 Colo. App. 416, 31 Pac. 233. The fact that a lien against the original debtor is released has been held immaterial if the debtor himself remains liable. Nelson v. Boynton, supra; Mallory v. Gillett, 21 N. Y. 412. See post, p. 87. A promise to pay another's debt merely if the promisee will forbear to sue the debtor, which he does, is within the statute. Gump v. Halberstadt, 15 Or. 356, 15 Pac. 467 (collecting cases on this point); Watson v. Randall, 20 Wend. (N. Y.) 201; White v. Rintoul, 108 N. Y. 222, 15 N. E. 318. And see Keadle v. Siddens, 5 Ind. App. 8, 31 N. E. 539; Dillaby v. Wilcox, 60 Conn. 71, 22 Atl. 491, 13 L. R. A. 643, 25 Am. St. Rep. 299; Parker v. Dillingham, 129 Ind. 542, 29 N. E. 23. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 47, 48.*

[36] Williams v. Leker, 3 Burr. 1886; Dock v. Boyd, 93 Pa. 92; Farley v. Cleveland, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387; Peck v. Goff, 18 R. I. 94, 25 Atl. 690; Woodruff v. Scaife, 83 Ala. 152, 3 South. 311; Belknap v. Bender, 75 N. Y. 446, 31 Am. Rep. 476; Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702; Fehlinger v. Wood, 134 Pa. 517, 19 Atl. 746; Leake v. Ball, 116 Ind. 214, 17 N. E. 918; Silsby v. Frost, 3 Wash. T. 388, 17 Pac. 887; Ledbetter v. McGhees, 84 Ga. 227, 10 S. E. 727; Mitts v. McMorran, 85 Mich. 94, 48 N. W. 288; Keyes v. Allen, 65 Vt. 667, 27 Atl. 319. But see Gower v. Stuart, 40 Mich. 747; Frame v. August, 88 Ill. 424. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 34; Cent. Dig. § 54.*

its consideration. In this class of cases it is immaterial whether the liability of the original debtor continues or not." [37]

(d) A promise to pay another's debt, to come within the statute, must be made to the creditor, and not to the debtor. A promise to the debtor himself to pay his debt for him does not require writing.[38] Illustrations of this are where a person buys land or goods, and agrees to pay the purchase money to a creditor of the seller, or, as part of the consideration, assumes a mortgage or other indebtedness of the seller. This is no more than a promise to pay the promisor's own debt in a particular way.[39]

(e) "If the principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered, not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another." [40] Under this rule the holder of a note or other security is bound by an oral guaranty of its payment,

[37] Wait v. Wait's Ex'r, 28 Vt. 350. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 34; Cent. Dig. § 54.*

[38] Eastwood v. Kenyon, 11 Adol. & E. 438; Windell v. Hudson, 102 Ind. 521, 2 N. E. 303; Alger v. Scoville, 1 Gray (Mass.) 391, 395; Harwood v. Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; Mersereau v. Lewis, 25 Wend. (N. Y.) 243; Ware v. Allen, 64 Miss. 545, 1 South. 738, 60 Am. Rep. 67; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Clark v. Jones, 85 Ala. 127, 4 South. 771; Meyer v. Hartman, 72 Ill. 442; Rabbermann v. Wiskamp, 54 Ill. 179. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 18; Cent. Dig. §§ 27–31.*

[39] Barker v. Bucklin, 2 Denio (N. Y.) 45, 43 Am. Dec. 726; Wilson v. Bevans, 58 Ill. 232; Clinton Nat. Bank v. Studemann, 74 Iowa, 104, 37 N. W. 112; Delp v. Brewing Co., 123 Pa. 42, 15 Atl. 871; Bateman v. Butler, 124 Ind. 223, 24 N. E. 989; Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 937; Skinker v. Armstrong, 86 Va. 1011, 11 S. E. 977; Nelswanger v. McClellan, 45 Kan. 599, 26 Pac. 18; Morris v. Gaines, 82 Tex. 255, 17 S. W. 538; Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677; Mulvany v. Gross, 1 Colo. App. 112, 27 Pac. 878; Lowe v. Hamilton, 132 Ind. 406, 31 N. E. 1117; American Pencil Co. v. Wolfe, 30 Fla. 360, 11 South. 488; Scudder v. Carter, 43 Ill. App. 252; Elkin v. Timlin, 151 Pa. 491, 25 Atl. 139; First Nat. Bank of Sing Sing v. Chalmers, 144 N. Y. 342, 39 N. E. 331. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 18; Cent. Dig. §§ 27–31.*

[40] Furbish v. Goodnow, 98 Mass. 296, per Gray, J. And see Prime v. Koehler, 77 N. Y. 91; Howell v. Harvey, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077; Emerson v. Slater, 22 How. 28, 16 L. Ed. 360; Little v. Edwards, 69 Md. 499, 16 Atl. 134; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; Mitchell v. Beck, 88 Mich. 342, 50 N. W. 305; First Nat. Bank of Sing Sing v. Chalmers, 120 N. Y. 658, 24 N. E. 848; Ferst v. Bank of Waycross, 111 Ga. 229, 36 S. E. 773. An oral promise by an attorney to prosecute a suit and pay all the cost, and, if successful, to have half the amount recovered, otherwise nothing, was held not within the statute. Wildey v. Crane, 69 Mich. 17, 36 N. W. 734. A contract of reinsurance has been

made for the purpose of inducing another to purchase it.[41] So the promise by a del credere agent to his principal to guaranty the solvency of the persons to whom he sells goods is not within the statute;[42] the agent becomes himself responsible for the payment of the money, and it is only incidental that he expects his obligation to be discharged by the person to whom he sells the goods.[43] Again, if a creditor has, or is about to file, a lien on property to secure his claim, and a third person, whose interests are or may be prejudiced thereby, guarantees the debt in consideration of a release of the lien or forbearance to file it, his object is to remove or prevent the lien, and the guaranty is merely incidental, and some courts hold that it need not be in writing,[44] though the weight of authority is probably to the contrary where the liability of the debtor continues.[45] And it has even been held that where the owner of a building, on which the contractor has abandoned work, promises to pay the contractor's workmen what is due them from

held not within the statute. Bartlett v. Insurance Co., 77 Iowa, 155, 41 N. W. 601. But see, contra, Egan v. Insurance Co., 27 La. Ann. 368. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

[41] Brown v. Curtiss, 2 N. Y. 225; Milks v. Rich, 80 N. Y. 269, 36 Am. Rep. 615; Cardell v. McNiel, 21 N. Y. 338; Darst v. Bates, 95 Ill. 493, at page 512. And see, in case of assignment and guaranty of judgment, Little v. Edwards, 69 Md. 499, 16 Atl. 134. So, also, where a person having property of his debtor to sell for payment of the debt guaranties the title to induce the promisee to buy it. Farnham v. Chapman, 61 Vt. 395, 18 Atl. 152. But see Dows v. Swett, 134 Mass. 142, 45 Am. Rep. 310. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

[42] Couturier v. Hastie, 8 Exch. 40, 5 H. L. Cas. 673; Sherwood v. Stone, 14 N. Y. 267; Wolff v. Koppel, 5 Hill (N. Y.) 458; Id., 2 Denio, 368, 43 Am. Dec. 751; Swan v. Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

[43] Wolff v. Koppel, supra. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

[44] Fitzgerald v. Dressler, 7 C. B. (N. S.) 374; Smith v. Exchange Bank, 110 Pa. 508, 1 Atl. 760; Wills v. Brown, 118 Mass. 138; Prime v. Koehler, 77 N. Y. 91; Dunlap v. Thorne, 1 Rich. (S. C.) 213; Shook v. Vanmater, 22 Wis. 532; Crawford v. King, 54 Ind. 6; Helt v. Smith, 74 Iowa, 667, 39 N. W. 81; Rogers v. Hardware Co., 24 Neb. 653, 39 N. W. 844; Scott v. White, 71 Ill. 287; Borchsenius v. Canutson, 100 Ill. 82; Power v. Rankin, 114 Ill. 52, 29 N. E. 185; Wooten v. Wilcox, 87 Ga. 474, 13 S. E. 595; Flagler v. Lipman, 1 Misc. Rep. 204, 20 N. Y. Supp. 878. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

[45] Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Curtis v. Brown, 5 Cush. (Mass.) 488; Mallory v. Gillett, 21 N. Y. 412; Bunneman v. Wagner, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306; Clark v. Jones, 85 Ala. 127, 4 South. 771; Stewart v. Jerome, 71 Mich. 201, 38 N. W. 895, 15 Am. St. Rep. 252; Warner v. Willoughby, 60 Conn. 468, 22 Atl. 1014, 25 Am. St. Rep. 343; Simpson v. Harris, 21 Nev. 353, 31 Pac. 1009. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

the contractor if they will go on with the work, the undertaking is original;[46] but this decision is a very doubtful one. The contrary has repeatedly been held.[47]

But the mere receipt by the promisor of some consideration or benefit for his promise is not sufficient to take it out of the statute, if the principal object of the contract is to pay the debt of another.[48]

Promise to Indemnify

There is no subject connected with the statute of frauds that is more difficult or has given rise to greater variety of opinion than contracts of indemnity. Is a promise to indemnify or save another harmless from any liability that he may incur as the result of a transaction into which he enters at the instance of the promisor—as in the case of a promise to indemnify the promisee against loss from going bail for another—within the statute? In England,[49] and by the decided weight of authority in this country,[50] such con-

[46] Andre v. Bodman, 13 Md. 241, 71 Am. Dec. 628 (in this case the claim against the contractor, it seems, was given up, so that there no longer existed any primary liability of a third person); Crawford v. Edison, 45 Ohio St. 239, 13 N. E. 80; Greenough v. Eichholtz (Pa. Sup.) 15 Atl. 712; Buchanan v. Moran, 62 Conn. 83, 25 Atl. 396; Craft v. Kendrick, 39 Fla. 90, 21 South. 803; Hall v. Alford, 105 Ky. 664, 49 S. W. 444; Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516; Almond v. Hart, 46 App. Div. 431, 61 N. Y. Supp. 849. And see Sext v. Geise, 80 Ga. 698, 6 S. E. 174 (where the promise was to pay for material); Bice v. Building Co., 96 Mich. 24, 55 N. W. 382. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 31, 32; Cent. Dig. §§ 47–49.*

[47] See Farnham v. Davis, 79 Me. 282, 9 Atl. 725; Greene v. Latcham, 2 Colo. App. 416, 31 Pac. 233; Hutton Bros. v. Gordon, 2 Misc. Rep. 267, 23 N. Y. Supp. 770; Wilhelm v. Voss, 118 Mich. 106, 76 N. W. 308. Where a widow, continuing her deceased husband's business, promised her husband's creditor to pay his debt if he would sell her goods on credit, the promise was held to be within the statute. Ruppe v. Peterson, 67 Mich. 437, 35 N. W. 82. And see Dirringer v. Moynihan (Com. Pl.) 10 N. Y. Supp. 540. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 31, 32; Cent. Dig. §§ 47–49.*

[48] Furbish v. Goodnow, 98 Mass. 296; Ames v. Foster, 106 Mass. 400, 8 Am. Rep. 343. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 50–53, 56.*

[49] Thomas v. Cook, 8 Barn. & C. 728; Reader v. Kingham, 13 C. B. (N. S.) 344 [overruling Green v. Creswell, 10 Ad. & E. 453]; Sutton v. Grey [1894] 1 Q. B. 285; Wildes v. Dudlow, L. R. 19 Eq. Cas. 198. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

[50] Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Aldrich v. Ames, 9 Gray (Mass.) 76; Beaman's Adm'rs v. Russel, 20 Vt. 205, 49 Am. Dec. 775; Lerch v. Gallop, 67 Cal. 595, 8 Pac. 322; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181 and note; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216; Esch v. White, 76 Minn. 220, 78 N. W. 1114; Warren v. Abbett, 65 N. J. Law, 99, 46 Atl. 575. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

tracts are not within the statute. There are a number of cases, however, holding the contrary.[51] It has sometimes been sought to distinguish between contracts within the statute and contracts of indemnity by saying without qualification that a promise of indemnity is not within the statute; but this is misleading. The true test is whether the promise is primary and original or whether it is merely collateral.[52] Thus, if the promisor undertakes to become primarily and absolutely liable for any loss which the promisee may incur by acting upon the request of the promisor, his promise is an original one, and need not be in writing; and it is a matter of no importance that another person is also liable to the promisee.[53] The promisor's obligation is not to pay such other person's debt, but his own. If, however, the main object and purpose of the promise is to answer for the debt or default of another for which that other is or becomes primarily liable, the promise is within the statute, even though it be in the form of a promise of indemnity.[54] This dictinction, however, has not always been observed or correctly applied in the cases, and in some instances there have been contrary decisions on almost identical states of fact.[55]

SAME—AGREEMENT IN CONSIDERATION OF MARRIAGE

41. The statute applies to "any agreement made upon consideration of marriage."

This clause of the statute does not apply to mutual promises to marry,[56] but to promises in consideration of, or conditional upon,

[51] NUGENT v. WOLFE, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291, Throckmorton Cas. Contracts, 62; May v. Williams, 61 Miss. 125, 48 Am. Rep. 80; Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; Wolverton v. Davis, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56. See Browne, Stat. Frauds, §§ 161, 162. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

[52] NUGENT v. WOLFE, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291, Throckmorton Cas. Contracts, 62. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

[53] Harrison v. Sawtell, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

[54] NUGENT v. WOLFE, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291, Throckmorton Cas. Contracts, 62. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 20, 21; Cent. Dig. §§ 32, 33.*

[55] See cases cited supra, notes.

[56] Clark v. Pendleton, 20 Conn. 495; Short v. Stotts, 58 Ind. 29; Blackburr v. Mann, 85 Ill. 222; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R.

a marriage actually taking place, such as promises to pay money, or to make a settlement of property, if the marriage is consummated.[57] An agreement between a man and woman that on their marriage the survivor shall take no interest in the property of the other, has been held to be a contract in consideration of marriage.[58] On the other hand, an oral contract between a man and a woman, by which the man was to provide for the comfort and support of the woman during life, pay her debts, take care of, manage, and improve certain land so as to make it productive, and to that end that the parties should marry and live together on the land, which should be conveyed by the woman to the man in fee simple, was held not to be within the statute, on the ground that the consideration for the conveyance of the land was the provision for the support and comfort of the woman, and not the marriage.[59]

The marriage of the parties is not such part performance as will take an antenuptial contract out of the operation of the statute.[60]

385. "It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships, to be valid, must be in writing." Withers v. Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

[57] Caton v. Caton, L. R. 1 Ch. App. 137; Ogden v. Ogden, 1 Bland (Md.) 284; Crane v. Gough, 4 Md. 316; Henry v. Henry, 27 Ohio St. 121; Finch v. Finch, 10 Ohio St. 507; Deshon v. Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; Chase v. Fitz, 132 Mass. 359; McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; Flenner v. Flenner, 29 Ind. 564; Caylor v. Roe, 99 Ind. 1; Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363; Frazer v. Andrews, 134 Iowa, 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593, 13 Ann. Cas. 556. A contract by which each party is to retain the title to his or her property, and dispose of it as if unmarried, is within the statute. Mallory's Adm'rs v. Mallory's Adm'r, 92 Ky. 316, 17 S. W. 737. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 4, 5; Cent. Dig. §§ 4, 5.*

[58] Carpenter v. Cornings, 51 Hun, 638, 4 N. Y. Supp. 947. See, also, Ennis v. Ennis, 48 Hun, 11. So, also, in case of an agreement that certain property shall go to the survivor. Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157. And see White v. Bigelow, 154 Mass. 593, 28 N. E. 904; Adams v. Adams, 17 Or. 247, 20 Pac. 633. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 4, 5; Cent. Dig. §§ 4, 5.*

[59] Larsen v. Johnson, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 4–6; Cent. Dig. §§ 4–6.*

[60] HUNT v. HUNT, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306, Throckmorton Cas. Contracts, 66; Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157. And see Johnstone v. Mappin, 60 Law J. Ch. 241; Flenner v. Flenner, 29 Ind. 564; Manning v. Riley, 52 N. J. Eq. 30, 27 Atl. 810. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 6.*

SAME—CONTRACT OR SALE OF LANDS, OR ANY INTEREST IN OR CONCERNING THEM

42. The following general rules may be mentioned:

(a) The contract must be for a substantial interest in land.

(b) Fructus industriales, or crops and other products of land, raised by labor and cultivation, are not an interest therein.

(c) Fructus naturales, or the natural growth and products of land, are an interest in land if the ownership is to pass before, but not if it is not to pass until after, severance.

(d) A mere license to enter on land is not an interest in land, but it is otherwise with an easement.

The treatment of this clause of the statute belongs more properly to a work on the law of real property, and we need only state the rules governing its application in a general way. The terms "lands," "tenements," and "hereditaments" have a clearly-defined meaning in the law of real property. They are used to denote the subjects of real property, as distinguished from personal property, or goods and chattels. It is often difficult, however, to determine what is an interest in land within this section.

A contract, to require writing as being for an interest in land, must be for a substantial interest, and not for arrangements preliminary to the acquisition of an interest, nor for a remote and inappreciable interest.[61] An agreement for a lease of land would be a con-

[61] Watters v. McGuigan, 72 Wis. 155, 39 N. W. 382. It has been held that where two execution creditors levy on the same land, and then agree that it shall be sold under one of the executions, and the proceeds divided, this is not a sale, but a compromise, and therefore not within the statute. Mygatt v. Tarbell, 78 Wis. 351, 47 N. W. 618. An agreement by an heir with his ancestor to release his expectations is within the statute. Brands v. De Witt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909. So, also, is an agreement by a vendee under an executory contract of sale to surrender to his vendor his interest under the contract. Dougherty v. Catlett, 129 Ill. 431, 21 N. E. 932. An agreement, on the sale of land, for abatement of price in case of a deficiency, is not within the statute. McGee v. Craven, 106 N. C. 351, 11 S. E. 375; Haviland v. Sammis, 62 Conn. 44, 25 Atl. 394, 36 Am. St. Rep. 330. Nor is an agreement by which a party promises to pay another a certain sum per acre for all the land the latter shall examine and advise the former to buy. Wilson v. Morton, 85 Cal. 598, 24 Pac. 784. Agreement between adjoining landowners as to building of partition fence. Rudisill v. Cross, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57. Oral agreement to arbitrate as to land. Fort v. Allen, 110 N. C. 183, 14 S. E. 685. Rent being an incident to the ownership of land, an assignment of rent must be in writing. King v. Kaiser, 3 Misc. Rep. 523, 23 N. Y. Supp. 21. Agreement to devise land. Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Hale v. Hale, 90

tract for an interest in land,[62] but an agreement to pay for an examination of title with a view to purchasing land, or to furnish another with money with which to buy land would not be within the statute,[63] nor would an agreement to transfer shares of stock in a railroad company or other corporation, which, though the company may own land, do not give any appreciable interest therein to the individual shareholders.[64] According to the better rule, which is also supported by the weight of authority, an oral contract between adjoining landowners, settling a doubt or dispute as to the boundary line between them, is not within the statute.[65]

The contrary has been held, however,[66] and where the purpose of the contract is not to settle the existing boundary, but to effect a transfer of land, it is within the statute.[67]

An agreement between landlord and tenant for the sale or sur-

Va. 728, 19 S. E. 739; In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74; Grant v. Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 83–89, 136–138.*

[62] Potter v. Arnold, 15 R. I. 350, 5 Atl. 379. Assignment of a lease the unexpired term of which is more than a year. Chicago Attachment Co. v. Davis Sewing-Mach. Co. (Ill. Sup.) 25 N. E. 669, 28 N. E. 959; Id., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 90, 91.*

[63] Horner v. Frazier, 65 Md. 1, 4 Atl. 133. An agreement by an agent to buy land in his own name for the benefit of his principal is not within the statute. Baker v. Wainwright, 36 Md. 336, 11 Am. Rep. 495. A parol partition is not within the statute. Meacham v. Meacham, 91 Tenn. 532, 19 S. W. 757; Wolf v. Wolf, 158 Pa. 621, 28 Atl. 164. Contra: Fort v. Allen, 110 N. C. 183, 14 S. E. 685. Nor is an agreement not to use land for a particular purpose. Hall v. Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 83–89, 136–138.*

[64] Anson, Cont. (4th Ed.) 61. But see Driver v. Broad, 4 Reports 411; Id. [1893] 1 Q. B. 744. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 83–89, 136–138.*

[65] Jenkins v. Trager (C. C.) 40 Fed. 726; Archer v. Helm, 69 Miss. 730, 11 South. 3; Ferguson v. Crick (Ky.) 23 S. W. 668; Lecomte v. Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; Grigsby v. Combs (Ky.) 21 S. W. 37; Jacobs v. Moseley, 91 Mo. 457, 4 S. W. 135; Sheets v. Sweeny, 136 Ill. 336, 26 N. E. 648; Atchison v. Pease, 96 Mo. 566, 10 S. W. 159; Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; Patterson v. Meyer, 28 Okl. 304, 114 Pac. 256; Teass v. City of St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802. As to ratification of an agreement, see Cavanaugh v. Jackson, 91 Cal. 580, 27 Pac. 931. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 112.*

[66] Camp v. Camp, 59 Vt. 667, 10 Atl. 748. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 112.*

[67] Weeks v. Martin, 57 Hun, 589, 10 N. Y. Supp. 656; Jenkins v. Trager (C. C.) 40 Fed. 726; Shaffer v. Hahn, 111 N. C. 1, 15 S. E. 1033; Buckner v. Anderson, 111 N. C. 572, 16 S. E. 424; Mann v. Mann, 152 Cal. 23, 91 Pac. 994. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 112.*

render of fixtures placed upon the land by the tenant is not a sale of an interest in land.[68]

According to the weight of authority, agreements for partnership dealings in land—that is, agreements under which the parties are to buy land for the purpose of selling it again, and dividing the profits or losses—are not within the statute.[69] So the appointment of an agent to sell land need not be in writing.[70]

Crops and Other Products of Land

Probably the chief question of interest with reference to this subject relates to the sale of crops and other products of land. A dis-

[68] South Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507; Frear v. Hardenbergh, 5 Johns. (N. Y.) 272, 4 Am. Dec. 350; Scoggin v. Slater, 22 Ala. 687; Heysham v. Dettre, 89 Pa. 506. Nor are they within section 17. Hallen v. Runder, 1 C., M. & R. 266; Lee v. Gaskell, 1 Q. B. D. 700. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 116–118.*

[69] McElroy v. Swope (C. C.) 47 Fed. 380; Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076; Howell v. Kelly, 149 Pa. 473, 24 Atl. 224; Gardner v. Randell, 70 Tex. 453, 7 S. W. 781; Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; Flower v. Barnekoff, 20 Or. 132, 25 Pac. 870, 11 L. R. A. 149; Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. Rep. 617; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; Case v. Seger, 4 Wash. 492, 30 Pac. 646; Coffin v. McIntosh, 9 Utah, 315, 34 Pac. 247. But see Young v. Wheeler (C. C.) 34 Fed. 98; Raub v. Smith, 61 Mich. 543, 28 N. W. 678, 1 Am. St. Rep. 619; Brosnan v. McKee, 63 Mich. 454, 30 N. W. 107; McKinnon v. McKinnon (C. C.) 46 Fed. 713; Clarke v. McAuliffe, 81 Wis. 104, 51 N. W. 83. An agreement between A. and B. to work a stone quarry together, and divide the profits, if B. can purchase land, to be paid for by A., to whom the deed is to be made, is not for an interest in land. Treat v. Hiles, 63 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858. But a contract by which two persons are to buy land and cultivate it on their joint account, applying the net proceeds to the payment of the purchase money, and when the land is paid for to own it as tenants in common, has been held within the statute. Wiley v. Wiley, 115 Md. 646, 81 Atl. 180, Ann. Cas. 1913A, 789. An agreement by a person to purchase land with his own money, and divide with another, is within the statute. Towle v. Wadsworth, 147 Ill. 80, 30 N. E. 602, 35 N. E. 73; Robbins v. Kimball, 55 Ark. 414, 18 S. W. 457, 29 Am. St. Rep. 45; Morton v. Nelson, 145 Ill. 586, 32 N. E. 916; Roughton v. Rawlings, 88 Ga. 819, 16 S. E. 89; Schultz v. Waldons, 60 N. J. Eq. 71, 47 Atl. 187. And see, further, as to what constitutes partnership dealings in lands. Nester v. Sullivan, 147 Mich. 493, 111 N. W. 85, 1033, 9 L. R. A. (N. S.) 1106; Norton v. Brink, 75 Neb. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. Rep. 822; Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427, and note. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 135–139.*

[70] Long v. Hartwell, 34 N. J. Law, 116; Johnson v. Dodge, 17 Ill. 433; Kempner v. Gans, 87 Ark. 221, 111 S. W. 1123, 112 S. W. 1087. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 74, 116; Cent. Dig. §§ 122–131, 251–260; "Principal and Agent," Cent. Dig. § 380.*

tinction exists between what are called "fructus industriales," such as crops of wheat, corn, and the like, which are obtained by labor and cultivation, and "fructus naturales," such as growing grass, timber, ores in the ground, and the like, produced by the power of nature alone.

Fructus industriales are chattels, and not an interest in land;[71] and this is true whether the crops are growing, or, having matured, have ceased to draw any nutriment from the soil.[72]

Fructus naturales, on the contrary, are such an interest, and a contract for their sale, which contemplates the passing of the property before the severance, is within the statute;[73] but it is otherwise if the title is not to pass until after they are severed.[74]

Licenses and Easements

A mere license to enter upon land and do a particular act or series of acts—as in the case of a license to enter upon land and remove property sold to the licensee—is not an interest in land, within the statute. It is otherwise, however, where the right conferred is to enter upon lands and erect and maintain a dam thereon. This is

[71] Evans v. Roberts, 5 Barn. & C. 829; Jones v. Flint, 10 Adol. & El. 753; Miller v. Baker, 1 Metc. (Mass.) 27; Whitmarsh v. Walker, Id. 313; Whipple v. Foot, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; Ross v. Welch, 11 Gray (Mass.) 235; Northern v. State, 1 Ind. 113; Graff v. Fitch, 58 Ill. 373, 11 Am. Rep. 85; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Marshall v. Ferguson, 23 Cal. 65; Purner v. Piercy, 40 Md. 223, 17 Am. Rep. 591. But see, contra, Kerr v. Hill, 27 W. Va. 576. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 116–118.*

[72] Turner v. Morris, 142 Mo. App. 60, 125 S. W. 238. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 116–118.*

[73] Rodwell v. Phillips, 9 Mees. & W. 501; Crosby v. Wadsworth, 6 East, 602; White v. Foster, 102 Mass. 375; Howe v. Batchelder, 49 N. H. 204; GREEN v. ARMSTRONG, 1 Denio (N. Y.) 550, Throckmorton Cas. Contracts, 69; Harrell v. Miller, 35 Miss. 700, 72 Am. Dec. 154; Owens v. Lewis, 46 Ind. 489, 15 Am. Rep. 295; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467; Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641; Ives v. Atlantic & N. C. R. Co., 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732, 9 Ann. Cas. 188, and note; Childers v. Wm. H. Coleman Co., 122 Tenn. 109, 118 S. W. 1018.

There is, however, much conflict, and in some states sales of growing trees, to be presently cut and removed by the purchaser, are held not to be within this section. Bostwick v. Leach, 3 Day (Conn.) 476; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; cf. Marshall v. Green, 1 C. P. D. 35. See Tiffany, Sales, 46. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 116–118.*

[74] Smith v. Surman, 5 B. C. 561; Washbourn v. Burrows, 11 East, 362; Drake v. Wells, 11 Allen (Mass.) 141; Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001; Banton v. Shorey, 77 Me. 48; Upson v. Holmes, 51 Conn. 500; Killmore v. Howlett, 48 N. Y. 569. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 116–118.*

more than a mere license; it is an easement. It is the transfer of an interest in the land.[75] A right of way is an interest in land.[76]

Statutes Varying from the English Statute

The statute in some states varies from the English statute. In Illinois, for instance, it applies to any contract for the sale of lands, etc., or any interest in or concerning them, "for a longer term than one year."[77] And in other states it applies only to contracts for the sale of lands or for the lease thereof for a longer term than one year.[78]

SAME—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR

43. The following rules may be mentioned:

(a) The agreement must be impossible of performance within the year.

(b) In some jurisdictions the agreement must contemplate non-performance by both parties within the year.

(c) In a few jurisdictions this clause of the statute does not apply to agreements relating to land.

Possibility of Performance

If, upon a reasonable construction of the contract, it appears to have been understood by the parties that it was not to be performed within the year, it is within the statute.[79] In order that an

[75] See Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60. In the case cited the authorities are collected and discussed at length. See, also, Whitmarsh v. Walker, 1 Metc. (Mass.) 313; Johnson v. Wilkinson, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698; Tayler v. Waters, 7 Taunt. 374; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Clanton v. Scruggs, 95 Ala. 279, 10 South. 757. Easement in portion of the water from a ditch. Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216. Agreement between railroads for joint use of the right of way of one not within the statute. Alabama G. S. R. Co. v. Railroad Co., 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401. Nor is an agreement between telegraph companies for the use by one of the other's poles. Farnsworth v. Telegraph Co., 53 Hun, 636, 6 N. Y. Supp. 735. A right to drain water over another's land is said to be an interest in land. Deyo v. Ferris, 22 Ill. App. 154; Id., 24 Ill. App. 416. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 60, 61; Cent. Dig. §§ 83–96.*

[76] Bonelli v. Blakemore, 66 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 60, 61; Cent. Dig. §§ 83–96.*

[77] Rev. St. Ill. c. 59, § 2.

[78] Virginia and Kentucky.

[79] White v. Fitts, 102 Me. 240, 66 Atl. 533, 15 L. R. A. (N. S.) 313, 120 Am. St. Rep. 483. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 46; Cent. Dig. § 72.*

agreement may fall within this clause of the statute, however, the parties must contemplate that it shall not be performed within a year. The mere fact that it may not be, or is not, performed within the year, does not bring it within the statute. It must appear, it has been said, that "it is to be performed after the year." [80] Further than this, the agreement must be impossible of completion within a year. If, by any possibility, it is capable of being completed within a year, it is not within the statute, though the parties may intend, and though it is probable, that it will extend over a longer period, and though it does in fact so extend.

The oral contracts that have been held enforceable under this rule may be classified as follows:

(a) Agreements for the performance of an act on the happening of a contingency which may possibly happen within a year—as in the case of agreements to do something on the marriage or death of a person, without further specification as to time; or upon the return of a ship, which may return within a year, though it does not in fact return until a longer time has elapsed; or upon the happening of any other event which may happen at any time.[81]

(b) Agreements for the continuous performance of acts until the happening of a contingency which may possibly happen within a year,—as in the case of agreements to render services, or to support a person, or to pay money from time to time, during a person's life, or until a person's marriage, or until the happening of any other

[80] Peter v. Compton, 1 Smith, Lead. Cas. 335; DOYLE v. DIXON, 97 Mass. 208, 93 Am. Dec. 80, Throckmorton Cas. Contracts, 72; Warner v. Railway Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495; Bullock v. Turnpike Co., 85 Ky. 184, 3 S. W. 129; Worley v. Sipe, 111 Ind. 238, 12 N. E. 385; Jones v. Pouch, 41 Ohio St. 146; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Sarles v. Sharlow, 5 Dak. 100, 37 N. W. 748; Warren Chemical & Mfg. Co. v. Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788; Durham v. Hiatt, 127 Ind. 514, 26 N. E. 401; Sweet v. Lumber Co., 56 Ark. 629, 20 S. W. 514; Niagara Fire Ins. Co. v. Greene, 77 Ind. 590; Cole v. Singerly, 60 Md. 348; MacElree v. Wolfersberger, 59 Kan. 105, 52 Pac. 69; Richmond Union Pass. R. v. Railroad Co., 96 Va. 670, 32 S. E. 787. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 49, 50, 52; Cent. Dig. §§ 74–79.*

[81] Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100; Updike v. Ten Broeck, 32 N. J. Law, 105; Anonymous, 1 Salk. 280; Blake v. Cole, 22 Pick. (Mass.) 97; McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; Cole v. Singerly, 60 Md. 348; Thomas v. Armstrong, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529; Bartlett v. Mystic River Corp., 151 Mass. 433, 24 N. E. 780; Clark v. Pendleton, 20 Conn. 495. A promise by a man to marry when he recovers his health, McConahey v. Griffey, 82 Iowa, 564, 48 N. W. 983; or when he returns from a voyage from which he may or may not return within a year, Clark v. Pendleton, 20 Conn. 495—is not within the statute. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 75–77.*

event which may possibly happen within a year.[82] In this class may be placed contracts that may be terminated at any time on notice, and contracts to perform acts so long as the other party may need such performance.[83]

(c) Agreements which, from their nature, and without mentioning any contingency, will be completely performed according to their terms and intention if a certain contingency shall happen within the year[84]—as in the case of agreements to forbear from personally doing certain acts for an indefinite time, or for a number of years, and which would be fully performed if the promisor should die within the year;[85] or of agreements to educate or support a

[82] Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Heath v. Heath, 31 Wis. 223; Carr v. McCarthy, 70 Mich. 258, 38 N. W. 241; Bell v. Hewitt's Ex'rs, 24 Ind. 280; Harper v. Harper, 57 Ind. 547; McGregor v. McGregor, L. R. 21 Q. B. Div. 424; Dresser v. Dresser, 35 Barb. (N. Y.) 573; Hutchinson v. Hutchinson, 46 Me. 154; Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110, 16 Pac. 82; East Line & R. R. R. Co. v. Scott, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; Stowers v. Hollis, 83 Ky. 544; Dailey v. Cain (Ky.) 13 S. W. 424. Nor is an agreement to work for a company "for the term of five years, or so long as A. shall continue to be agent for the company." Roberts v. Rockbottom Co., 7 Metc. (Mass.) 46. Nor an agreement to employ a person so long as he may be disabled from an injury which he has received. East Tennessee, V. & G. R. Co. v. Staub, 7 Lea (Tenn.) 397. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 49–52; Cent. Dig. §§ 74–79.*

[83] First Baptist Church v. Insurance Co., 19 N. Y. 305; Roberts v. Rockbottom Co., 7 Metc. (Mass.) 46; Walker v. Railroad Co., 26 S. C. 80, 1 S. E. 366; Blake v. Voight, 11 N. Y. Supp. 716; Id., 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622; Johnston v. Bowersock, 62 Kan. 148, 61 Pac. 740. Contra: Dobson v. Collis, 1 H. & N. 81; Biest v. Shoe Co., 97 Mo. 137, 70 S. W. 1081. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 49–52; Cent. Dig. §§ 74–79.*

[84] An agreement by a railroad company to maintain cattle guards in consideration of a right of way is not within the statute, since it may cease to use the right of way before expiration of a year. Arkansas M. R. Co. v. Whitley, 54 Ark. 199, 15 S. W. 465, 11 L. R. A. 621. A parol contract of partnership, without any fixed time for continuance, and the business of which may be completed within a year, is not within the statute. Jordan v. Miller, 75 Va. 442; Treat v. Hiles, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858. It is otherwise if the partnership is to be continued beyond a year. Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623. And see, on the rule stated in the text, Frazer v. Gates, 118 Ill. 99, 1 N. E. 817; Dailey v. Cain (Ky.) 13 S. W. 424; Great Western Turnpike Co. v. Shafer, 57 App. Div. 331, 68 N. Y. Supp. 8. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 75–77.*

[85] Under this rule it has been repeatedly held that an agreement not to carry on a certain business at a particular place was not within the statute, "because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his personal representatives, it would be fully performed if he died within the year." DOYLE v. DIXON, 97 Mass. 208, 93 Am. Dec. 80, Throckmorton Cas. Contracts, 72; Lyon v. King, 11 Metc. (Mass.) 411, 45 Am. Dec.

child until a certain age, at which he will not arrive for several years, or for an indefinite time, and which would be completely performed if the child should die within the year.[86] The agreement, to come within this class, must be such that it will be fully "performed" on the happening of the contingency, and not merely terminated. If it cannot be fully performed within the year, the fact that it may be terminated, or that further performance may be excused or rendered impossible, is not sufficient to take it out of the statute.[87] And this is true even though the contract contains a provision by which either party may terminate it within a year.[88]

(d) Agreements which fix no definite time for their performance,

219; Worthy v. Jones, 11 Gray (Mass.) 168, 71 Am. Dec. 696; Hill v. Jamieson, 16 Ind. 125, 79 Am. Dec. 414; Richardson v. Pierce, 7 R. I. 330. And it is immaterial in such cases that the agreement specifies that the promisor is to forbear for a certain number of years. DOYLE v. DIXON, supra. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 75–77.*

[86] Peters v. Westborough, 19 Pick. (Mass.) 364, 31 Am. Dec. 142; Ellicott v. Turner, 4 Md. 476; Wooldridge v. Stern (C. C.) 42 Fed. 311, 9 L. R. A. 129; Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008. See, also, Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Carnig v. Carr, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; Yellow Poplar Lumber Co. v. Rule, 106 Ky. 455, 50 S. W. 685; Sax v. Railway Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; Martin v. Batchelder, 69 N. H. 360, 41 Atl. 83 (to keep house for year). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 75–77.*

[87] DOYLE v. DIXON, supra. For this reason it has been held that an agreement to employ a boy for five years, and to pay his father certain sums at stated periods during that time, was within the statute; for though, by the death of the boy, the services which were the consideration of the promise would cease, and the promise therefore be determined, it would not be completely performed. Hill v. Hooper, 1 Gray (Mass.) 131. And see Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550 (Cf. Warner v. Railway Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, criticising this case). And so, according to the weight of authority, an agreement for personal services for a period of more than one year is within the statute, for, on the death of either party, it would be terminated, and not fully performed. Williams v. Bemis, 108 Mass. 91, 11 Am. Rep. 318; Lee's Adm'r v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Day v. Railroad Co., 51 N. Y. 583, 590; Haynes v. Mason, 30 Ill. App. 85; William Butcher Steel Works v. Atkinson, 68 Ill. 421, 18 Am. Rep. 560; Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328. In such cases, where the employé is discharged or quits the employment, after part performance, he may recover for what he has done, not on the contract, but on an implied assumpsit. Cases cited supra; Baker v. Lauterbach, 68 Md. 64, 11 Atl. 703. See, also, post, p.119. If the term of employment is indefinite, the contract is not within the statute. See, also, Dobson v. Collis, 1 Hurl. & N. 81. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 75–77.*

[88] Wagniere v. Dunnell, 29 R. I. 580, 73 Atl. 309, 17 Ann. Cas. 205. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 51; Cent. Dig. § 78.*

but which, in view of the subject-matter and of the understanding of the parties, may be fully performed within a year;[89] as an agreement for the making and gathering of a crop which may be made within a year, although a longer time is usually required.[90]

(e) Agreements of which performance may be required within a year if either party so chooses, though neither intends to require performance, and neither in fact requires it, until after expiration of the year.[91]

Part Performance within a Year

Another rule, which is established in England and in most of our states, is that an agreement does not fall within the statute if that which one of the parties is to do is all to be performed within a year; in other words, the agreement must contemplate nonperformance by both parties within the year.[92] A part performance by one of the parties, however, will not take the agreement out of the statute.[93]

Some of the states, however, have refused to recognize this rule, and hold that, even though all that is to be done by one of the parties is to be fully done within a year, the agreement is nevertheless within the statute, if the other party's promise is not to be perform-

[89] Thomas v. Croom, 102 Ark. 108, 143 S. W. 88. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 49; Cent. Dig. § 74.*

[90] Valley Planting Co. v. Wise, 93 Ark. 1, 123 S. W. 768, 26 L. R. A. (N. S.) 403. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 49; Cent. Dig. § 74.*

[91] Haussman v. Burnham, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; Seddon v. Rosenbaum, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337; Walker v. Johnson, 96 U. S. 424, 24 L. Ed. 834; Connolly v. Giddings, 24 Neb. 131, 37 N. W. 939. A contract intended to be performed within a year is not within the statute, though before the year expires it is extended six months. Ward v. Matthews, 73 Cal. 13, 14 Pac. 604; Donovan v. Richmond, 61 Mich. 467, 28 N. W. 516. A written lease for more than a year, but with less than a year to run, may be modified by parol. Doherty v. Doe, 18 Colo. 456, 33 Pac. 165. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 45; Cent. Dig. §§ 67–71.*

[92] Donellan v. Read, 3 Barn. & Adol. 899; Horner v. Frazier, 65 Md. 1, 4 Atl. 133; Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 720; Winters v. Cherry, 78 Mo. 344; Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; Durfee v. O'Brien, 16 R. I. 213, 14 Atl. 857; Dant v. Head, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369; Berry v. Doremus, 30 N. J. Law, 399; Piper v. Fosher, 121 Ind. 407, 23 N. E. 269; Grace v. Lynch, 80 Wis. 166, 49 N. W. 751; Curtis v. Sage, 35 Ill. 22; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Washburn v. Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 54, 136; Cent. Dig. §§ 81, 300.*

[93] See Osborne v. Kimball, 41 Kan. 187, 21 Pac. 163; Shumate v. Farlow, 125 Ind. 359, 25 N. E. 432; Baker v. Codding, 18 N. Y. Supp. 159; Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486; Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 136; Cent. Dig. § 300.*

ed within the year;[94] and in these states no recovery can be had on the contract by the party who has performed his part, though he may sue on the promise implied on the part of the other party from his acceptance of the benefits of such performance.[95]

It is held in Illinois that an agreement which is to be fully performed within the year, except for the mere payment of money, is not within the statute; the party to whom the money is payable having performed on his part.[96]

Particular Contracts

According to the weight of authority, this clause of the statute applies to promises to marry which are, by their terms, to be performed after the expiration of a year.[97]

It has, however, been held in England, and in some of our states, that it does not apply to contracts relating to land.[98] Mr. Browne, in his work on the Statute of Frauds, takes the contrary view, and says that "it includes all those contracts which are of such duration, whatever be their subject-matter."[99] We have been unable to find any case in which the point seems to have been directly raised and decided in accordance with Mr. Browne's statement, but there are many cases which assume that the statute applies to agreements relating to land. For instance, some courts hold that a parol lease for a year, to commence on a future day, is within this clause of the statute.[1] In some of the states the statute in regard to con-

[94] Whipple v. Parker, 29 Mich. 369; Marcy v. Marcy, 9 Allen (Mass.) 8; Frary v. Sterling, 99 Mass. 461; Pierce v. Paine's Estate, 28 Vt. 34; Sheehy v. Adarene, 41 Vt. 541, 98 Am. Dec. 623; Lane v. Shackford, 5 N. H. 130; Montague v. Garnett, 3 Bush (Ky.) 297; Broadwell v. Getman, 2 Denio (N. Y.) 87; McElroy v. Ludlum, 32 N. J. Eq. 828; Jackson Iron Co. v. Concentrating Co., 65 Fed. 298, 12 C. C. A. 636. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 136; Cent. Dig. § 300.*

[95] Whipple v. Parker, 29 Mich. 369. See, also, post, p. 119, note 90; ante, p. 18. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 129, 136; Cent. Dig. §§ 288, 300.*

[96] Curtis v. Sage, 85 Ill. 22; Worden v. Sharp, 56 Ill. 104. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 54, 136; Cent. Dig. §§ 81, 300.*

[97] Derby v. Phelps, 2 N. H. 515; Clark v. Pendleton, 20 Conn. 495; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Nichols v. Weaver, 7 Kan. 373; Lewis v. Tappan, 90 Md. 294, 45 Atl. 469, 47 L. R. A. 385. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[98] Hollis v. Edwards, 1 Vern. 159; Fall v. Hazelregg, 45 Ind. 576, 15 Am. Rep. 278; Sobey v. Brisbee, 20 Iowa, 105; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356; Wilson v. Martin, 1 Denio (N. Y.) 602; Railsback v. Walke, 81 Ind. 409. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[99] Browne, St. Frauds, § 272.

[1] Delano v. Montague, 4 Cush. (Mass.) 42; Wheeler v. Frankenthal, 78 Ill. 124; Comstock v. Ward, 22 Ill. 248; Olt v. Lohnas, 19 Ill. 576; Roberts v.

tracts relating to land excepts from its operation "leases for a term not exceeding one year," and "contracts for the leasing for a period not longer than one year," and in some states it is held that such a statute does not apply to agreements for a lease for a year to commence in the future.[2]

A contract for services for one year, to commence at a future day, is within the statute,[3] even though it is to commence on the day after the contract is made;[4] but it is otherwise if it is to commence on the day the contract is entered into.[5]

SAME—FORM REQUIRED

44. CONTENTS OF WRITING. The writing must show:
   (a) The names or descriptions of the parties.
   (b) The terms and subject-matter of the agreement.
   (c) The consideration (in most jurisdictions).

45. SEPARATE PAPERS. The writing may be on separate papers, provided they are all signed by the party to be charged or his agent, or that such as are not so signed are attached to or referred to in a signed paper.

46. BY WHOM SIGNED. In most jurisdictions only the signature of the party to be charged is required, but in some jurisdictions contracts consisting of mutual promises must be signed by both parties.

Tennell, 3 T. B. Mon. (Ky.) 247; Wilson v. Martin, 1 Denio (N. Y.) 602; Atwood v. Norton, 31 Ga. 507; Strehl v. D'Evers, 66 Ill. 77; Jellett v. Rhode, 43 Minn. 166, 45 N. W. 13, 7 L. R. A. 671; White v. Holland, 17 Or. 3, 3 Pac. 573; Beller v. Devall, 40 Mo. App. 251; White v. Levy, 93 Ala. 484, 9 South. 164; Cook v. Redman, 45 Mo. App. 397. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[2] Whiting v. Ohlert, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356; McCroy v. Toney, 66 Miss. 233, 5 South. 392, 2 L. R. A. 847; Goldberg v. Lavinski, 3 Misc. Rep. 607, 22 N. Y. Supp. 552. Contra, Greenwood v. Strother, 91 Ky. 482, 16 S. W. 138. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[3] BRITAIN v. ROSSITER, L. R. 11 Q. B. D. 123, Throckmorton Cas. Contracts, 86; Bracegirdle v. Heald, 1 B. & A. 722; Townsend v. Minford, 48 Hun, 617, 1 N. Y. Supp. 565; Lee's Adm'r v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Baker v. Codding, 18 N. Y. Supp. 159; Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[4] Billington v. Cahill, 51 Hun, 132, 4 N. Y. Supp. 660. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[5] Cawthorne v. Cordrey, 13 C. B. N. S. 406; 32 L. J. (C. P.) 152; Cox v. Brewing Co., 58 Hun, 634, 6 N. Y. Supp. 841; Aiken v. Nogle, 47 Kan. 96, 27

47. HOW SIGNED. The signature may be by mark or initial, and, unless the statute requires the name to be "subscribed," may be printed, and may be in any part of the writing.

48. AGENT TO SIGN. Where the signature is by agent, the agent must be a third person; but a person who acts as agent of one person in making the contract may act as agent of both in making the memorandum.

49. DELIVERY. The writing need not be delivered, except it be in form of a deed of land.

Form Merely Evidentiary

The statute does not require that the contract itself be reduced to writing. A valid oral contract may exist, but if it is within the statute of frauds it may not be enforced for the want of written evidence by which alone it may be proved.[6]

For this reason the memorandum or note may be made at any time between the formation of the contract and the commencement of an action thereon.[7] The writing need not be intended as a formal contract,[8] nor, in fact, is it required to be in any particular form.[9] All that is required is written evidence of the agreement, and therefore the memorandum may consist of letters written by the party to be charged to his own agent, or to other third persons.[10] The memorandum may even consist of entries made by the

Pac. 825; Hudgins v. State, 126 Ga. 639, 55 S. E. 492. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 44; Cent. Dig. § 66.*

[6] ULLSPERGER v. MEYER, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221, 3 Ann. Cas. 1032, Throckmorton Cas. Contracts, 74. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 103, 106; Cent. Dig. §§ 193–210.*

[7] Lerned v. Wannemacher, 9 Allen (Mass.) 412; Gale v. Nixon, 6 Cow. (N. Y.) 445; Sheehy v. Fulton, 38 Neb. 691, 57 N. W. 395, 41 Am. St. Rep. 767. But not after the action is commenced. Bill v. Bament, 9 Mees. & W. 36; Lucas v. Dixon, 22 Q. B. Div. 357; Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571. But see post, p. 103, note 17. It has been held in Illinois that an oral agreement in consideration of marriage is not taken out of the statute by being reduced to writing after marriage. McAnnulty v. McAnnulty, 120 Ill, 26, 11 N. E. 397, 60 Am. Rep. 552. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 104; Cent. Dig. § 209.*

[8] ULLSPERGER v. MEYER, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221, 3 Ann. Cas. 1032, Throckmorton Cas. Contracts, 74. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 103, 106; Cent. Dig. §§ 192–210.*

[9] Atwood v. Cobb, 16 Pick. (Mass.) 230, 26 Am. Dec. 657. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[10] Gibson v. Holland, L. R. 1 C. P. 1; Peabody v. Speyers, 56 N. Y. 230; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; Cunningham v. Williams, 43 Mo. App. 629;

party to be charged on his or his agent's books;[11] and entries in the records of a corporation may prove a contract by it.[12] So, also, resolutions of a city council may be a sufficient memorandum of a contract by it on behalf of the city.[13] A telegram may be a sufficient memorandum to satisfy the statute and charge the party by whom it is sent.[14] Even recitals in a will have been held sufficient evidence of a contract by the testator to answer for the debts of his son.[15]

A letter repudiating a verbal contract previously made by the writer may be sufficient.[16] Some of the courts seem to hold that the admission of an oral contract in the pleadings in an action is a sufficient memorandum, but the decisions are no doubt based on the fact that the statute, not having been pleaded, is waived.[17] However this may be, the contrary is the rule.[18]

Spangler v. Danforth, 65 Ill. 152; Moss v. Atkinson, 44 Cal. 3; North Platte Milling & Elevator Co. v. Price, 4 Wyo. 293, 33 Pac. 664; Nicholson v. Dover, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 103, 106; Cent. Dig. §§ 192–208.*

[11] Johnson v. Dodgson, 2 Mees & W. 653; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484; Coddington v. Goddard, 16 Gray (Mass.) 436. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[12] Tufts v. Mining Co., 14 Allen (Mass.) 407; McManus v. City of Boston, 171 Mass. 152, 50 N. E. 607 (record of board of street commissioners); Lamkin v. Manufacturing Co., 72 Conn. 57, 47 Atl. 593, 1042, 44 L. R. A. 786. *See "Frauds, Statute of." Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[13] Marden v. Champlin, 17 R. I. 423, 22 Atl. 938; Argus Co. v. City of Albany, 55 N. Y. 495, 14 Am. Rep. 296; City of Greenville v. Waterworks Co., 123 Ala. 625, 27 South. 764. But see Wilhelm v. Fagan, 90 Mich. 6, 50 N. W. 1072. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[14] Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Marschall v. Vineyard Co., 1 Misc. Rep. 511, 21 N. Y. Supp. 468; McElroy v. Buck, 35 Mich. 434; Little v. Dougherty, 11 Colo. 103, 17 Pac. 292; Everman v. Herndon (Miss.) 11 South. 652; Whaley v. Hinchman, 22 Mo. App. 483. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[15] In re Hoyle, [1893] 1 Ch. 84. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 192; Cent. Dig. §§ 192–208.*

[16] LOUISVILLE ASPHALT VARNISH CO. v. LORICK, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212, Throckmorton Cas. Contracts, 80; Capitol City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 S. E. 562. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208, 263.*

[17] Gregg v. Garrett, 13 Mont. 10, 31 Pac. 721; Lauer v. Mercantile Inst., 8 Utah, 305, 31 Pac. 397. See ante, p. 102, note 7; post, p. 120, notes 95, 96. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[18] Taylor v. Allen, 40 Minn. 433, 42 N. W. 292; Holler v. Richards, 102 N. C. 545, 9 S. E. 460; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220; Browning v. Berry, 107 N. C. 231, 12 S. E. 195, 10 L. R. A. 726. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

Showing as to Agreement

The memorandum must show agreement on the part of the party sought to be charged; that is, it must show a concluded contract in so far as he is concerned.[19] In most jurisdictions, where a written proposal has been made by the party sought to be charged, an acceptance by the other party may be established by parol evidence.[20]

Showing as to the Parties

The memorandum of the contract must show who are the parties to it; not only who is the promisor, but who is the promisee as well. Thus, where a person promised that he would answer for the debt of a third person, and signed a memorandum to that effect, but the memorandum did not show the name of the promisee, it was held insufficient. "No document," it was said, "can be an agreement or memorandum of one, which does not show on its face who the parties making the agreement are." [21]

A party need not be named, if he is sufficiently described; and the description will let in parol evidence to show his identity.[22]

[19] Coe v. Tough, 116 N. Y. 273, 22 N. E. 550. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 106; Cent. Dig. §§ 193–211.*

[20] Reuss v. Picksley, L. R. 1 Exch. 342; Farwell v. Lowther, 18 Ill. 252; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; Ehrmanntraut v. Robinson, 52 Minn. 333, 54 N. W. 188; Himrod Furnace Co. v. Railroad Co., 22 Ohio St. 451. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 106; Cent. Dig. §§ 193–211.*

[21] Williams v. Lake, 2 El. & El. 349. And see McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; McElroy v. Seery, 61 Md. 389, 48 Am. Rep. 110; Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366; McGovern v. Hern, 153 Mass. 308, 26 N. E. 861, 10 L. R. A. 815, 25 Am. St. Rep. 632; Lewis v. Wood, 153 Mass. 321, 26 N. E. 862, 11 L. R. A. 143; Coombs v. Wilkes [1891] 3 Ch. 77; Watt v. Cranberry Co., 63 Iowa, 730, 18 N. W. 898. A memorandum of a sale of goods, which does not clearly show which party is vendor and which vendee, is not sufficient. Frank v. Eltringham, 65 Miss. 281, 3 South. 655; Bailey v. Ogden, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509. But see Newell v. Radford, L. R. 3 C. P. 52; Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493; Thornton v. Kelly, 11 R. I. 498. An auctioneer's memorandum of a sale of land must show who the vendor is. O'Sullivan v. Overton, 56 Conn. 102, 14 Atl. 300; Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 107, 158; Cent. Dig. §§ 212, 213, 375.*

[22] Sale v. Lambert, 18 Eq. 1; Fessenden v. Mussey, 11 Cush. (Mass.) 127; Lerned v. Johns, 9 Allen (Mass.) 419; Catling v. King, 5 Ch. Div. 660; Thornton v. Kelly, 11 R. I. 498; Violett v. Powell's Adm'r, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; Dykers v. Townsend, 24 N. Y. 57; Jones v. Dow, 142 Mass. 130, 7 N. E. 839. Where a defendant had directed his factor to sell goods, and to use a fictitious name to represent him as seller, and the fictitious name was inserted in the factor's memorandum, parol evidence was held admissi-

Where A. in his own name enters into a contract as the agent of B., the other party to the contract may show by parol evidence that he really contracted with B., who has been described in the memorandum in the character of A.[23]

Showing as to Terms

The memorandum must contain all the material terms of the contract expressed with such certainty that it may be understood without recourse to parol evidence.[24]

Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing, or may contract orally, or put some of the terms in writing, and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract. Where, however, a contract falls within the statute, all its terms must be in writing.[25] Parol evidence of terms not appearing in the writing would invalidate the contract by showing that it was different from what appears in the memorandum.

It is said in a Massachusetts case that: "The contract or memorandum must express the substance of the contract with reasonable certainty, either by its own terms or by reference to some other deed, record, or other matter from which it can be ascertained with

ble to show that the name represented defendant. Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. But see Minard v. Mead, 7 Wend. (N. Y.) 68; Newcomb v. Clark, 1 Denio (N. Y.) 226. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 107, 158; Cent. Dig. §§ 212, 213, 375.*

[23] Trueman v. Loder, 11 Adol. & El. 589; Dykers v. Townsend, 24 N. Y. 57; Sanborn v. Flagler, 9 Allen (Mass.) 477; Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16; McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Violett v. Powell's Adm'r, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355. The agent, however, so contracting cannot show by parol that he did not intend to bind himself. Higgins v. Senior, 8 Mees. & W. 834; Waring v. Mason, 18 Wend. (N. Y.) 425. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 158; Cent. Dig. § 375.*

[24] Patt v. Gerst, 149 Ala. 287, 42 South. 1001; Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154; McKnight v. Broadway Inv. Co., 147 Ky. 535, 145 S. W. 377. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 239–241.*

[25] May v. Ward, 134 Mass. 127; Drake v. Seaman, 97 N. Y. 230; Messmore v. Cunningham, 78 Mich. 623, 44 N. W. 145; Lester v. Heidt, 86 Ga. 226, 12 S. E. 214, 10 L. R. A. 108; Ringer v. Holtzclaw, 112 Mo. 519, 20 S. W. 800; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Willy v. Robert, 27 Mo. 388; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Kriete v. Myer, 61 Md. 558. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 239–241.*

like reasonable certainty. The statute is intended as a shield. No particular forms are required, and it looks at the substance of the contract. It requires a note or memorandum of the contract, not a detail of all its particulars." [26] While this is no doubt sound law, it must not be taken to mean that any of the terms of the contract can be shown by parol.

Same—Price and Terms of Payment

The price is usually regarded as an essential term of a contract of sale and as such is required to be stated in the memorandum.[27] This is certainly true where the action is by the vendor against the vendee, for the promise to pay the price is the most important part of the contract of the party who is sought to be charged.[28] It has been held, however, that a statement of the price is not necessary if it has been paid; [29] and some courts hold such statement not

[26] Atwood v. Cobb, 16 Pick. (Mass.) 230, 26 Am. Dec. 657. And see ULLSPERGER v. MEYER, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221, 3 Ann. Cas. 1032, Throckmorton Cas. Contracts, 74; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Frazer v. Howe, 106 Ill. 563; Farwell v. Mather, 10 Allen (Mass.) 322, 87 Am. Dec. 641; Gordon v. Avery, 102 N. C. 532, 9 S. E. 486. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 239-241.*

[27] Webster v. Brown, 67 Mich. 328, 34 N. W. 676; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841; Phelps v. Stillings, 60 N. H. 505; Soles v. Hickman, 20 Pa. 180. Contra in Texas, Morrison v. Dailey (Tex.) 6 S. W. 426; Fulton v. Robinson, 55 Tex. 401.

"If the promise in terms, however, be to pay what the goods are reasonably worth, or if the promise be simply to pay for the goods, from which the law would infer a promise to pay their reasonable worth, then no definite or fixed price need be stated in the writing." Turner v. Lorillard Co., 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345, per Cobb, J. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[28] Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698; Adams v. McMillan, 7 Port. (Ala.) 73; Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104, 107 Am. St. Rep. 474. In the case last cited it is said, per Walker, J.: "There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter can be shown by parol as at common law, and the writing, as said by Ruffin, C. J., in Miller v. Irvine [18 N. C. 104], need not contain any matters but such as charge him (the vendor); that is, such stipulations as are to be performed on his part. He is to convey, and the writing must be sufficient to show that this duty rests upon him, as one of the parties to the contract, when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him" [citing Clark on Contracts (2d Ed.) pp. 85, 86, 87]. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[29] Sayward v. Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

necessary to the sufficiency of a memorandum in a suit by the vendee against the vendor.[30]

Even where the price is stated, some courts hold the memorandum insufficient if it fails to state the terms of payment.[31]

Showing as to Subject-Matter

The writing must also show the subject-matter, at least to such an extent that it can be identified.[32] Parol evidence is admitted to identify the subject-matter to which the writing refers; as, for instance, to identify a house described in the writing as a "house on Church street," or property described as "your half, E. B. wharf, and premises this day agreed upon between us." [33] Such parol evi-

[30] Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683 [overruling Grace v. Denison, 114 Mass. 16]; White v. Dahlquist Mfg. Co., 179 Mass. 427, 60 N. E. 791; Johnson v. Ronald, 4 Munf. (Va.) 77. Contra, Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300, in which it is said, per Sherwood, J.: "At one time in this court the heresy was announced that parol testimony was admissible for the purpose indicated. O'Neil v. Crain, 67 Mo. 251. The last erroneous adjudication on this subject is found in Ellis v. Bray, 79 Mo. 227; but the contrary and correct ruling was declared in Ringer v. Holtzclaw, 112 Mo. 519, 20 S. W. 800, and followed in Boyd v. Paul, 125 Mo. 9, 28 S. W. 171." And see cases cited supra, note 27. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[31] Sault v. Stormont, 51 Mich. 636, 17 N. W. 214; Nelson v. Shelby Mfg. & Imp. Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116 (memorandum relied on by vendor to establish validity of contract against vendee). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[32] Whelan v. Sullivan, 102 Mass. 204; Beekman v. Fletcher, 48 Mich. 555, 12 N. W. 849; Tice v. Freeman, 30 Minn. 389, 15 N. W. 674; King v. Wood, 7 Mo. 389; Mason v. Small, 130 Mo. App. 249, 109 S. W. 822. "I have sold this place" is not sufficient. Cunha v. Gallery, 29 R. I. 230, 69 Atl. 1001, 18 L. R. A. (N. S.) 616, 132 Am. St. Rep. 811. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 109, 110; Cent. Dig. §§ 222–236.*

[33] Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Tallman v. Franklin, 14 N. Y. 584; Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; Mellon v. Davison, 123 Pa. 298, 16 Atl. 431; Henderson v. Perkins, 94 Ky. 207, 21 S. W. 1035; Dougherty v. Chesnutt, 86 Tenn. 1, 5 S. W. 444; Lente v. Clarke, 22 Fla. 515, 1 South. 149; Cossitt v. Hobbs, 56 Ill. 231; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Quinn v. Champagne, 38 Minn. 322, 37 N. W. 451; Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; Humbert v. Brisbane, 25 S. C. 506; Oliver v. Hunting, 44 Ch. Div. 205; Francis v. Barry, 69 Mich. 311, 37 N. W. 353. A memorandum is not sufficient where it merely describes it as "an estate on A. street, owned by B.," and the evidence shows that B. owned two estates on that street. Doherty v. Hill, 144 Mass. 465, 11 N. E. 581. And see Jones v. Tye, 93 Ky. 390, 20 S. W. 383; Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 25 South. 709, 77 Am. St. Rep. 46. "Your land," in a letter to the alleged vendor is not sufficient. Taylor v. Allen, 40 Minn. 433, 42 N. W. 292. And see Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379. A memorandum that P. shall have the land "of which he is now in possession" has been held sufficient. Phil-

dence, however, is confined to evidence of the location of objects mentioned, the circumstances of the parties, as, for example, the property owned by them, and other external matters, and does not extend to spoken language passing between the parties.[84] It must be confined to the construction and application of the writing and may not be used to add to or subtract from it.[85]

Showing as to Consideration

Not only must a consideration for the promise sought to be enforced exist, but it must, according to the rulings in England, and probably in most of the states, expressly or impliedly appear in the memorandum. As stated by Lord Ellenborough in the leading case on this point, the reason for the rule is because the word "agreement," used in the statute, "is not satisfied unless there be a consideration, which consideration, forming part of the agreement, ought, therefore, to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing." [86] Other courts have refused to recognize this doctrine, though in some of these cases the statute used the word "promise" instead of "agreement." [87] Most of

lips v. Swank, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691. And see Falls of Neuse Mfg. Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568. An agreement for the sale of a designated number of acres "in" a specified larger tract of land is not sufficient. Brockway v. Frost, 40 Minn. 155, 41 N. W. 411. And see Repetti v. Maisak, 6 Mackey, 366. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 109, 110, 158; Cent. Dig. §§ 222–236, 375.*

[84] Desmarais v. Taft, 210 Mass. 560, 97 N. E. 98. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 158; Cent. Dig. § 375.*

[85] Cole v. Cole, 99 Miss. 335, 54 South. 953, 34 L. R. A. (N. S.) 147, Ann. Cas. 1913E, 332; Bogard v. Barhan, 52 Or. 121, 96 Pac. 673, 132 Am. St. Rep. 676. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 109–111; Cent. Dig. §§ 222–237.*

[86] Wain v. Warlters, 5 East, 10. And see Sears v. Brink, 3 Johns. (N. Y.) 210, 3 Am. Dec. 475; Taylor v. Pratt, 3 Wis. 674; Thompson v. Blanchard, 3 N. Y. 335; Ordeman v. Lawson, 49 Md. 135; Sloan v. Wilson, 4 Har. & J. (Md.) 322, 7 Am. Dec. 672; Buckley v. Beardslee, 5 N. J. Law, 572, 8 Am. Dec. 620; Gregory v. Logan, 7 Blackf. (Ind.) 112; Ellison v. Water Co., 12 Cal. 542; Hargroves v. Cooke, 15 Ga. 321. It is sufficient if the consideration can be gathered from the entire contract. The words "value received" have been held enough. Watson's Ex'rs v. McLaren, 19 Wend. (N. Y.) 557; D. M. Osborne & Co. v. Baker, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; Edelin v. Gough, 5 Gill (Md.) 103; Emerson v. C. Aultman & Co., 69 Md. 125, 14 Atl. 671; Smith v. Northrup, 80 Hun, 65, 29 N. Y. Supp. 851. The presence of a seal has been held a sufficient recital of the consideration. Johnston v. Wadsworth, 24 Or. 494, 34 Pac. 13; Smith v. Northrup, supra. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 214–221.*

[87] Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; Brittain v. Aingier, 48 N. H. 422; Gilligan v. Boardman, 29 Me. 79; Patchin v. Swift, 21 Vt. 292; Shively v. Black, 45 Pa. 345; Sage v. Wilcox, 6 Conn. 81; Violett

the states, however, have put this question at rest by statutory provisions expressly declaring it necessary [38] or unnecessary [39] to express the consideration in the writing. Even where the statute provides that the consideration need not be expressed, it must be expressed if it is executory, and modifies the promise; for in such case it is a term of the contract.[40]

Separate Papers

The memorandum may consist in any number of letters, telegrams, or other pieces of paper.[41] The papers, however, must be connected, consistent, and complete.

It is generally held that the connection between various papers must be made out from the papers themselves,[42] and that it cannot

v. Patton, 5 Cranch, 151, 3 L. Ed. 61 (construing the Virginia statute); Reed v. Evans, 17 Ohio, 128; Steadman v. Guthrie, 4 Metc. (Ky.) 147; Taylor v. Ross, 3 Yerg. (Tenn.) 330; Adkins v. Watson, 12 Tex. 199; Halsa v. Halsa, 8 Mo. 303; How v. Kemball, 2 McLean, 103, Fed. Cas. No. 6,748; Brown v. Fowler, 70 N. H. 211, 47 Atl. 412. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 214–221.*

[38] It is declared necessary in Alabama, Minnesota, Nevada, Oregon, and Wisconsin. But the amount of the consideration need not appear, and the words "for value received" are sufficient. Jansen v. Kuenzie, 145 Wis. 473, 130 N. W. 430, Ann. Cas. 1912A, 1241. A guaranty of a note, written by a third person on the note before delivery, need express no consideration, since the guaranty requires no other consideration than that which the note on its face implies to have passed between the original parties. Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743 (under Alabama statute). Contra: Commercial Nat. Bank of Appleton v. Smith, 107 Wis. 574, 83 N. W. 766. It is otherwise if the guaranty is written after the note has been delivered and taken effect as a contract. Moses v. Bank, supra. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 214–221.*

[39] It is declared unnecessary in Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, and Virginia. See Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 214–221.*

[40] See Drake v. Seaman, 97 N. Y. 230. And see ante, p. 106. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 214–221.*

[41] LOUISVILLE ASPHALT VARNISH CO. v. LORICK, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212, Throckmorton Cas. Contracts, 80; Reuss v. Picksley, L. R. 1 Exch. 342; Ryan v. United States, 136 U. S. 83, 10 Sup. Ct. 913, 34 L. Ed. 447; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 343; Gulf, C. & S. F. Ry. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228; Bayne v. Wiggins, 139 U. S. 210, 11 Sup. Ct. 521, 35 L. Ed. 144; Olson v. Sharpless, 53 Minn. 91, 55 N. W. 125; Schneider v. Anderson, 75 Kan. 11, 88 Pac. 525, 121 Am. St. Rep. 356. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 214–221.*

[42] If all the separate papers are signed, reference in the one to the other need not be made, if by inspection and comparison it appears that they form part of the same transaction. Thayer v. Luce, 22 Ohio St. 62. See, also,

be shown by parol evidence.[43] But, if one paper is referred to in another, it may be identified by parol evidence.[44]

To say that the papers must be consistent is merely to reiterate what was said in treating of offer and acceptance.

Signature

It is essential that the memorandum be signed by "the party to be charged," or some other person by him lawfully authorized.[45] As to whether it must have been signed by the party seeking to enforce it, there is some conflict. Probably all courts hold that it need not be so signed if the consideration given by the party suing is executed. The conflict is where there are mutual promises. Some courts hold in these cases that the contract, not being enforceable against the party who has not signed it, is void for want of mutuality.[46] Most courts hold that the statute is satisfied if the memoran-

Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. But see Potter v. Peters, 72 L. J. Rep. 624. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 118; Cent. Dig. § 264.*

[43] Where a person issued a prospectus of illustrations of Shakspeare, to be published on terms of subscription therein set out, and A. entered his name in a book entitled "Shakspeare Subscribers, their Signatures," in the publisher's shop, and afterwards refused to subscribe, it was held that there was no sufficient reference to connect the subscription book with the prospectus, so as to make a memorandum. Boydell v. Drummond, 11 East, 142. And see Peirce v. Corf, L. R. 9 Q. B. 210; Taylor v. Smith, 61 Law J. Q. B. 331; Morton v. Dean, 13 Metc. (Mass.) 385; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Doughty v. Manhattan Brass Co., 101 N. Y. 644, 4 N. E. 747; North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879; Oliver v. Insurance Co., 82 Ala. 417, 2 South. 445; Orne v. Cook, 31 Ill. 238; Duff v. Hopkins (D. C.) 83 Fed. 599; Coombs v. Wilkes, [1891] 3 Ch. 77; Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715. A contract for the sale of land, containing no description of it, was held insufficient, though there was a description of land on the back of the paper, there being no words to connect the indorsement with the contract. Wilstach v. Heyd, 122 Ind. 574, 23 N. E. 963. Reciprocal wills not referring to each other. Hale v. Hale, 90 Va. 728, 19 S. E. 739. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 118; Cent. Dig. § 264.*

[44] Long v. Miller, 4 C. P. Div. 450; Oliver v. Insurance Co., 82 Ala. 417, 2 South. 445; Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Work v. Cowhick, 81 Ill. 317; Lee v. Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 118; Cent. Dig. § 264.*

[45] Sanborn v. Sanborn, 7 Gray (Mass.) 142; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826; Rafferty v. Lougee, 63 N. H. 54; Bailey v. Ogden, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; Guthrie v. Anderson, 47 Kan. 383, 28 Pac. 164; Id., 49 Kan. 416, 30 Pac. 459; McElroy v. Seery, 61 Md. 389, 48 Am. Rep. 110; Moore v. Powell, 6 Tex. Civ. App. 43, 25 S. W. 472. Cf. Gardels v. Kloke, 36 Neb. 493, 54 N. W. 834. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[46] Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708; Corbitt v. Gaslight Co., 6 Or. 405, 25 Am. Rep. 541; Krohn v. Bantz, 68 Ind.

dum is signed by the party against whom it is sought to be enforced.[47]

The signature may be by mark [48] or initials,[49] or it may be typewritten,[50] printed, stamped, or engraved.[51] Nor need the signature be placed at the end of the document as a formal signature. If the name of the party to be charged appear in the memorandum, so as to be applicable to the whole substance of the writing, and was written by himself, or by his authorized agent, it is immaterial where the name appears, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum.[52] Where, however, the statute requires the memorandum to be "sub-

277; Stiles v. McClellan, 6 Colo. 89. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[47] ULLSPERGER v. MEYER, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221, 3 Ann. Cas. 1032, Throckmorton Cas. Contracts, 74; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Reuss v. Picksley, L. R. 1 Exch. 342; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 487; Old Colony R. Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Love v. Welch, 97 N. C. 209, 2 S. E. 242; Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352; Oliver v. Insurance Co., 82 Ala. 417, 2 South. 445; J. I. Case Threshing Mach. Co. v. Smith, 16 Or. 331, 18 Pac. 641; Smith's Appeal, 69 Pa. 481; Anderson v. Harold, 10 Ohio, 399; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Perkins v. Hadsell, 50 Ill. 217; Gartrell v. Stafford, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 767; Cunningham v. Williams, 43 Mo. App. 629; Scott v. Glenn, 97 Cal. 513, 32 Pac. 573; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035; Capitol City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 S. E. 562. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[48] Baker v. Dening, 8 Adol. & E. 94; Zacharie v. Franklin, 12 Pet. 151, 9 L. Ed. 1035; Brown v. Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[49] Sanborn v. Flagler, 9 Allen (Mass.) 474; Salmon Falls Mfg. Co. v. Goddard, 14 How. 447, 14 L. Ed. 493; Palmer v. Stephens, 1 Denio (N. Y.) 471. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[50] Garton Toy Co. v. Buswell Lumber & Mfg. Co., 150 Wis. 341, 136 N. W. 147. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[51] Bennett v. Brumfitt, L. R. 3 C. P. 30; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343; Schneider v. Norris, 2 Maule & S. 286; Weston v. Myers, 33 Ill. 424. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[52] Davis v. Shields, 26 Wend. (N. Y.) 341, 353; Coddington v. Goddard, 16 Gray (Mass.) 444; Caton v. Caton, L. R. 2 H. L. 127; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484; Boardman v. Spooner, 13 Allen (Mass.) 358, 90 Am. Dec. 196; Penniman v. Hartshorn, 13 Mass. 87; Evans v. Hoare [1892] 1 Q. B. 593; Braley v. Kelly, 25 Minn. 160; Tingley v. Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

scribed," it has been held that there must be a formal signature at the bottom of the memorandum.[53]

A party to a contract may sign a rough draft of its terms, and acknowledge his signature when the draft has been corrected, and the contract is actually concluded.[54]

Signature by Agent

The memorandum may be signed by the duly authorized agent of the party to be charged.[55] The agent must not be the other contracting party, but some third person, for to allow otherwise would be to open the door for the fraud which the statute was intended to prevent.[56]

The same person, however, as, for example a broker, may act as agent for both parties.[57] So in cases of sales at auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum is binding on both. He is the agent of the vendor by virtue of his employment, and he is made the agent of the vendee by the act of the latter in giving him his bid, and receiving the announcement that the property is knocked off to him as purchaser.[58] This, however, does not apply where the vendor is himself the auctioneer.[59] The memorandum must be made at the time of the sale.[60]

[53] Davis v. Shields, 26 Wend. (N. Y.) 341. And see James v. Patten, 6 N. Y. 9, 55 Am. Dec. 376; Champlin v. Parrish, 11 Paige (N. Y.) 405. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[54] Stewart v. Eddowes, L. R. 9 C. P. 314. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 115; Cent. Dig. §§ 242–250.*

[55] Heffron v. Armsby, 61 Mich. 505, 28 N. W. 672; Tynan v. Dullnig (Tex. Civ. App.) 25 S. W. 465. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260; "Principal and Agent," Cent. Dig. § 380.*

[56] Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295. And see Sherman v. Brandt, L. R. 6 Q. B. 720; Farebrother v. Simmons, 5 Barn. & Ald. 333; Carlisle v. Campbell, 76 Ala. 247; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[57] Ankeny v. Young Bros., 52 Wash. 235, 100 Pac. 736. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[58] Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Trustees of First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28; Morton v. Dean, 13 Metc. (Mass.) 385; McBrayer v. Cohen (Ky.) 18 S. W. 123; Meadows v. Meadows, 3 McCord (S. C.) 458, 15 Am. Dec. 645; Singstack's Ex'rs v. Harding, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669. See Wyckoff v. Mickle (N. J. Ch.) 20 Atl. 214. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[59] Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[60] Gill v. Bicknell, 2 Cush. (Mass.) 355; Horton v. McCarty, 53 Me. 394. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

As we have already seen, if the agent signs his own name, the other party to the contract may show by parol that he really contracted with the principal.[61] The agent, however, after making the contract in his own name, cannot show by parol that he is not the real party to the contract.[62]

Unless the statute expressly so requires, the authority of the agent need not be in writing.[63] In some states, however, the statute does so require in the case of certain contracts, as contracts relating to land,[64] or contracts of suretyship.[65]

Delivery

The memorandum, being required merely as evidence of the contract, need not be delivered.[66] Nondelivery is only material in so far as it may tend to show that no final agreement has been reached. It is held, however, that a deed of land must be delivered to constitute a sufficient memorandum.[67] A delivery of the deed in escrow is sufficient.[68]

[61] Ante, p. 105.

[62] Higgins v. Senior, 8 Mees. & W. 834; Waring v. Mason, 18 Wend. (N. Y.) 425. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[63] Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Kennedy v. Ehlen, 31 W. Va. 540, 8 S. E. 398; Watson v. Sherman, 84 Ill. at page 267. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[64] Hall v. Wallace, 88 Cal. 434, 26 Pac. 360; Gerhart v. Peck, 42 Mo. App. 644; Castner v. Richardson, 18 Colo. 496, 33 Pac. 163; Kozel v. Dearlove, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; Detroit, P. & N. Ry. Co. v. Hartz, 147 Mich. 354, 110 N. W. 1089; Thomas v. Rogers, 108 Minn. 132, 121 N. W. 630, 133 Am. St. Rep. 421; Adams v. Carlton, 77 Kan. 546, 95 Pac. 390; Ross v. Craven, 84 Neb. 520, 121 N. W. 451; Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[65] Simpson v. Commonwealth, 89 Ky. 412, 12 S. W. 630. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 251–260.*

[66] Drury v. Young, 58 Md. 546, 42 Am. Rep. 343; Ames v. Ames, 46 Ind. App. 597, 91 N. E. 509. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 117; Cent. Dig. § 261.*

[67] Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22; Callanan v. Chapin, 158 Mass. 113, 32 N. E. 941; Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093; Day v. Lacasse, 85 Me. 242, 27 Atl. 124. And see Kopp v. Reiter, 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156. But see Johnston v. Jones, 85 Ala. 286, 4 South. 748. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 117; Cent. Dig. § 261.*

[68] Johnston v. Jones, 85 Ala. 286, 4 South. 748; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315; Lewis v. Prather (Ky.) 21 S. W. 538. But see Ducett v. Wolf, 81 Mich. 311, 45 N. W. 829. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 117; Cent. Dig. § 261.*

SAME—EFFECT OF NONCOMPLIANCE

50–51. Failure to comply with the requirement of the fourth section does not render the contract void, but merely excludes parol proof, and renders it unenforceable.

The English statute, which has been followed by the statutes of most of the states, does not declare that the contracts, if entered into orally, shall be void, but simply that "no action shall be brought" on them. The statute does not go to the existence of the contract, but merely makes written evidence necessary to establish it. The contract is not void, but simply unenforceable by suit.[69]

Although the contract cannot, for this reason, be sued upon successfully, it is available for some purposes. If it has been fully performed, the courts will recognize and protect the rights of the parties acquired under it.[70] And if it has been performed by one of the parties by payment of the consideration he will not be allowed to recover back what he has paid, where the other party is willing to perform on his part.[71]

[69] BRITAIN v. ROSSITER, 11 Q. B. Div. 123, Throckmorton, Cas. Contracts, 86; Leroux v. Brown, 12 C. B. 801; Townsend v. Hargraves, 118 Mass. 325; Montague v. Garnett, 3 Bush (Ky.) 297; Baker v. Lauterbach, 68 Md. 64, 11 Atl. 703; Crane v. Gough, 4 Md. 316; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Brakefield v. Anderson, 87 Tenn. 206, 10 S. W. 360; Browning v. Parker, 17 R. I. 183, 20 Atl. 835; Ohio & M. R. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812; Montgomery v. Edwards, 46 Vt. 151, 14 Am. Rep. 618; Chicago Dock Co. v. Kinzie, 49 Ill. 289; La Du-King Mfg. Co. v. La Du, 36 Minn. 443, 31 N. W. 938; Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571. The courts often use the word "void" carelessly, and the fact that they speak of a contract as void cannot always be relied on. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 119, 125; Cent. Dig. §§ 113, 266–277.*

[70] See supra, note 69.

[71] Galway v. Shields, 66 Mo. 313, 27 Am. Rep. 351; Coughlin v. Knowles, 7 Metc. (Mass.) 57, 39 Am. Dec. 759; Sims v. Hutchins, 8 Smedes & M. (Miss.) 331, 47 Am. Dec. 90; Shaw v. Shaw, 6 Vt. 69; Hawley v. Moody, 24 Vt. 605. And see Lane v. Shackford, 5 N. H. 130; Richards v. Allen, 17 Me. 296; Bedinger v. Whittamore, 2 J. J. Marsh. (Ky.) 563; Collier v. Coates, 17 Barb. (N. Y.) 473; McKinney v. Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; Nelson v. Improving Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116; Butler v. Dinan, 65 Hun, 620, 19 N. Y. Supp. 950. But see Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486, in which it was held that a person orally employed for a longer period than a year may abandon the contract without fault on his employer's part, and recover for the services rendered; post, p. 119. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 119, 125; Cent. Dig. §§ 113, 266–277.*

In some states, however, the statute declares that the contract "shall be void" unless in writing.[72] In these states it seems that the statute goes to the existence of the contract, and renders it absolutely void. In a Massachusetts case, however, in construing the section of the statute of that state relating to contracts for the sale of goods, which declared that no such contract should be held to be good and "valid," it was held that it was not the intention of the legislature to declare such contracts void, but simply to prevent oral proof.[73]

Further illustration of the rule that a contract which does not comply with the statute is not void, but simply unenforceable, is found in the mode in which courts of equity deal with such contracts, to be presently explained.

Part Performance

At law, unless the statute so provides, part performance of an oral contract does not take it out of the operation of the statute;[74] but it is otherwise in equity.

Same—In Equity

A court of equity will dispense with the written evidence required by the statute when one of the parties has under certain conditions performed his part of the contract.

The equitable rule has sometimes been limited to contracts relating to an interest in land;[75] but "it is probably more accurate to say that the doctrine of part performance applies to all cases in which a court of equity would entertain a suit for

[72] See Popp v. Swanke, 68 Wis. 364, 31 N. W. 916. Such are the statutes of Alabama, California, Michigan, Nevada, New York, Oregon, and Wisconsin. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 119, 125; Cent. Dig. §§ 113, 266–275.*

[73] Townsend v. Hargraves, 118 Mass. 325. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 119, 125; Cent. Dig. §§ 113, 266–277.*

[74] Chicago Attachment Co. v. Sewing-Mach. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 734; Henry v. Wells, 48 Ark. 485, 3 S. W. 637; Wheeler v. Frankenthal, 78 Ill. 124; Nally v. Reading, 107 Mo. 350, 17 S. W. 978; Brown v. Pollard, 89 Va. 696, 17 S. E. 6; Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. The statute does expressly provide in Iowa, Alabama, and probably in other states, that certain acts of part performance shall take the contract out of the statute. Louisville & N. R. Co. v. Philyaw, 94 Ala. 463, 10 South. 83; Price v. Lien, 84 Iowa, 390, 51 N. W. 52. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 287–326.*

[75] BRITAIN v. ROSSITER, 11 Q. B. Div. 123, Throckmorton, Cas. Contracts, 86. And see Osborne v. Kimball, 41 Kan. 187, 21 Pac. 163; McElroy v. Ludlum, 32 N. J. Eq. 828. As to contracts in consideration of marriage, see ante, p. 90. As to contracts not to be performed within a year, see ante, p. 99. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 142; Cent. Dig. § 343.*

specific performance if the alleged contract had been in writing." [76]

Even in the case of contracts relating to land it is not enough that services have been rendered in consideration of an oral promise to grant lands, nor that the price has otherwise been paid in whole or in part; for the acts relied upon as part performance "must be unequivocally, and in their own nature, referable to some such agreement as that alleged." [77] Where, however, the purchaser has taken possession [78] under an oral contract for the

[76] McManus v. Cooke, 35 C. D. 697, per Kay, J. See Anson, Cont. (8th Ed.) 70. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 142; Cent. Dig. § 343.*

[77] Maddison v. Alderson, 8 App. Cas. 479, 7 Q. B. Div. 174. In this case a promise of a gift of land had been made to a person in consideration of her remaining in the service of the promisor during his lifetime. It was held that the continuance of the service for the required period could not be regarded as exclusively referable to the promised gift. It might have rested on other considerations. And see Rogers v. Wolfe, 104 Mo. 1, 14 S. W. 805; Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; Smith v. Pierce, 65 Vt. 200, 25 Atl. 1092. But see Brinton v. Van Cott, 8 Utah, 480, 33 Pac. 218. That payment or part payment of the purchase money is not alone sufficient, see Glass v. Hulbert, 102 Mass., at page 28, 3 Am. Rep. 418; Brown v. Pollard, 89 Va. 696, 17 S. E. 6; Peckham v. Balch, 49 Mich. 179, 13 N. W. 506; Boulder Valley Ditch Min. & Mill. Co. v. Farnham, 12 Mont. 1, 29 Pac. 277; Webster v. Gray, 37 Mich. 37; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Crabill v. Marsh, 38 Ohio St. 331; Townsend v. Vanderwerker, 20 D. C. 197; Washington Brewery Co. v. Carry (Md.) 24 Atl. 151; Horn v. Luddington, 82 Wis. 73; Forrester v. Flores, 64 Cal. 24, 28 Pac. 107; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; Maxfield v. West, 6 Utah, 327, 379, 23 Pac. 754, and 24 Pac. 98; Humbert v. Brisbane, 25 S. C. 506; Temple v. Johnson, 71 Ill. 13; Cronk v. Trumble, 66 Ill. 428; Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708. Contra, where the price consisted of the dismissal of actions and marriage with a certain woman. Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146. And see Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227. But marriage alone between the vendor and vendee is not sufficient. Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244. It is otherwise where there has been fraud in procuring the marriage. Id. Promise to devise land to the promisee's daughter if he will allow the promisor to adopt her. Pond v. Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414. Relinquishing of position by son-in-law, and living on land under agreement by father-in-law to give it to him. Welch v. Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810. Delivery of deed as part performance. Luzader v. Richmond, 128 Ind. 344, 27 N. E. 736; Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 292, 307.*

[78] As to what constitutes sufficient possession, see Hunt v. Lipp, 30 Neb. 469, 46 N. W. 632; Emmel v. Hayes, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769; Neibert v. Baghurst (N. J. Ch.) 25 Atl. 474; Swales v. Jackson, 126 Ind. 282, 26 N. E. 62; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 142; Cent. Dig. § 343.*

sale of land, and paid the purchase money or other consideration,[79] or made valuable improvements thereon,[80] equity will enforce performance on the part of the vendor. "The whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. * * * The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon, and in pursuance of, the oral agreement, and so connected with the performance of the contract that, from the nature of the case, the defendant should understand it was done in reliance upon his agreement."[81] Possession, to constitute such part performance as to warrant the interference of a court of equity, must have been under the contract,[82] and it must be accompanied by

[79] Bechtel v. Cone, 52 Md. 698; Jamison v. Dimock, 95 Pa. 52; Carney v. Carney, 95 Mo. 353, 8 S. W. 729; Watts v. Witt, 39 S. C. 356, 17 S. E. 822; Fitzsimmons v. Allen, 39 Ill. 440; Lipp v. Hunt, 25 Neb. 91, 41 N. W. 143; Gould v. Banking Co., 136 Ill. 60, 26 N. E. 497; Denlar v. Hile, 123 Ind. 68, 24 N. E. 170. Contra, Bradley v. Owsley, 74 Tex. 69, 11 S. W. 1052. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 318–321.*

[80] Potter v. Jacobs, 111 Mass. 32; Barrett v. Forney, 82 Va. 269; Cutsinger v. Ballard, 115 Ind. 93, 17 N. E. 206; Hunter v. Mills, 29 S. C. 72, 6 S. E. 907; Wallace v. Scoggins, 17 Or. 476, 21 Pac. 558; Holmden v. Janes, 42 Kan. 738, 21 Pac. 591; Moulton v. Harris, 94 Cal. 420, 29 Pac. 706; Mudgett v. Clay, 5 Wash. 103, 31 Pac. 424; Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 655; Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664; McWhinne v. Martin, 77 Wis. 182, 46 N. W. 118; Morrison v. Herrick, 27 Ill. App. 339, affirmed in 130 Ill. 631, 22 N. E. 537; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Anderson v. Brewing Co., 173 Ill. 213, 50 N. E. 655; Low v. Low, 173 Mass. 580, 54 N. E. 257. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 318–321.*

[81] Brown v. Hoag, 35 Minn. 373, 29 N. W. 135, per Mitchell, J. See, also, Caton v. Caton, L. R. 1 Ch. App. 147; Semmes v. Worthington, 38 Md. 208; Wheeler v. Reynolds, 66 N. Y. 227; Sullivan v. O'Neal, 66 Tex. 433, 1 S. W. 185; Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435; Clark v. Clark, 122 Ill. 388, 13 N. E. 553; McLeod v. Hendry, 126 Ga. 167, 54 S. E. 949; Henderson v. Henrie, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628, Ann. Cas. 1912B, 318; Seaman v. Aschermann, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. § 307.*

[82] Jacobs v. Railroad Co., 8 Cush. (Mass.) 224; Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435; Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091; Green v. Groves, 109 Ind. 519, 10 N. E. 401; Miller v. Ball, 64 N. Y. at page 292; Birkbeck v. Kelly (Pa. Sup.) 9 Atl. 313; Boozer v. Teague, 27 S. C. 348, 3 S. E. 551; Mahana v. Blunt, 20 Iowa, 142; Messmore v. Cunningham, 78 Mich. 623, 44 N. W. 145; Pawlak v. Granowski, 54 Minn. 130, 55 N. W. 831; Clark v. Clark, 122 Ill. 388, 13 N. E. 553; Foster v. Maginnis, 89 Cal. 264, 26 Pac. 828. See, also, cases cited supra, note 77. Must there-

payment of the purchase money, or by valuable and permanent improvements. Mere possession alone is not enough.[83]

It has frequently been said that improvements without possession are not sufficient;[84] but, on the other hand, the making of valuable permanent improvements on the land by the vendee, in pursuance of the agreement, and with the knowledge of the other party, is always considered the strongest and most unequivocal act of part performance by which an oral contract to sell land is taken out of the statute;[85] and the better opinion is that, if the vendee has no adequate remedy at law, such improvements are sufficient, even where not accompanied by possession, to justify a court of equity in granting specific performance of the contract.[86]

A few of the courts have refused to recognize the doctrine that part performance takes a contract out of the statute,[87] but the doctrine is supported both in England and in this country by an overwhelming weight of authority.

Compelling Execution of Writing

In some states, courts of equity, in the exercise of their jurisdiction to grant relief in case of fraud, have compelled the execution of a written contract where the party sought to be charged had agreed to execute it, but afterwards fraudulently refused to keep his promise.[88] Other courts hold that refusal to execute a

fore be taken after the making of the contract. Wright v. Nulton, 219 Pa. 253, 68 Atl. 707; Maloy v. Boyett, 53 Fla. 956, 43 South. 243. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. § 292.*

[83] Glass v. Hulbert, 102 Mass. at page 32, 3 Am. Rep. 418; Hibbert v. Aylott's Heirs, 52 Tex. 530; Miller v. Ball, 64 N. Y. at page 292; Dougan v. Blocher, 24 Pa. 28; Moore v. Small, 19 Pa. 461; Galbreath v. Galbreath, 5 Watts (Pa.) 146; Ann Berta Lodge No. 42, I. O. O. F., v. Leverton, 42 Tex. at page 26. But see Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715; Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. 881. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 303–326.*

[84] Wooldridge v. Hancock, 70 Tex. 18, 6 S. W. 818. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 303–326.*

[85] Henrikson v. Henrikson, 143 Wis. 314, 127 N. W. 962, 33 L. R. A. (N. S.) 534. And see Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 637 (sustaining gift of land upon evidence of possession and improvements). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 303–326.*

[86] Henrikson v. Henrikson, 143 Wis. 314, 127 N. W, 962, 33 L. R. A. (N. S.) 534. *See "Specific Performance," Dec. Dig. (Key-No.) §§ 39–47; Cent. Dig. §§ 114–132.*

[87] Dunn v. Moore, 38 N. C. 364; Ridley v. McNairy, 2 Humph. (Tenn.) 174; Beaman v. Buck, 9 Smedes & M. (Miss.) 207; Pass v. Brooks, 125 N. C. 129, 34 S. E. 228. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 287–326.*

[88] Equitable Gaslight Co. of Baltimore City v. Manufacturing Co., 63 Md.

written contract as agreed is not such a fraud as will take the contract out of the statute.[88]

Part Performance—Recovery Quasi ex Contractu

Where one of the parties to an oral contract within the statute of frauds pays money or performs services thereunder, of which the other party has received the benefit, the law implies a promise, or rather imposes a duty upon him, to pay for the benefit conferred; and an action may be maintained against him, not upon the contract, but upon the appropriate common counts in assumpsit, the measure of recovery being, not the agreed price, but the value of the benefit conferred.[90]

The Contract as a Defense

The provision that "no action shall be brought" on oral contracts within the statute not only prevents suit on such a contract,

285; Baker v. Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; McDonald v. Yungbluth (C. C.) 46 Fed. 836. In Iowa the court decreed specific performance of a parol agreement to assign a patent right, though Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], requires assignments to be in writing. Searle v. Hill, 73 Iowa, 367, 35 N. W. 490, 5 Am. St. Rep. 688. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 114–119.*

[88] Caylor v. Roe, 99 Ind. 1; Jackson v. Myers, 120 Ind. 504, 22 N. E. 90, and 23 N. E. 86; Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Safe Deposit & Trust Co. of Pittsburg v. Diamond Coal & Coke Co., 234 Pa. 100, 83 Atl. 54. And see Glass v. Hulbert, 102 Mass. 30, 3 Am. Rep. 418. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 114–119.*

[90] Dowling v. McKenney, 124 Mass. 478; Henrikson v. Henrikson, 143 Wis. 314, 127 N. W. 962, 33 L. R. A. (N. S.) 534; Whipple v. Parker, 29 Mich. 369; Whitaker v. Burrows, 71 Hun, 478, 24 N. Y. Supp. 1011; Patten v. Hicks, 48 Cal. 509. And see cases cited post, note 92. As to recovery of money or other consideration paid, see Welch v. Darling, 59 Vt. 136, 7 Atl. 547; Herrick v. Newell, 49 Minn. 198, 51 N. W. 819; Schroeder v. Loeber, 75 Md. 195, 23 Atl. 579, and 24 Atl. 226; Worth v. Patton, 5 Ind. App. 272, 31 N. E. 1130; Nelson v. Improvement Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116. Recovery for services rendered. Cadman v. Markle, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; Sprague v. Haines, 68 Tex. 215, 4 S. W. 371; Stevens v. Lee, 70 Tex. 270, 8 S. W. 40; Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486; Jeffery v. Walker, 72 Hun, 628, 25 N. Y. Supp. 161; Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 862; Springer v. Bien (Com. Pl.) 10 N. Y. Supp. 530; Schoonover v. Vachon, 121 Ind. 8, 22 N. E. 777; Miller v. Eldredge, 126 Ind. 461, 27 N. E. 132; Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. 511; Koch v. Williams, 82 Wis. 186, 52 N. W. 257; Stout's Adm'r v. Royston, 107 S. W. 784, 32 Ky. Law Rep. 1053; Wilson v. Wilderness Poultry Farm, 82 N. J. Law, 352, 82 Atl. 517. In Minnesota, inconsistently, the agreement fixes the value of the services rendered under it. Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484; Spinney v. Hill, 81 Minn. 316, 84 N. W. 116. Recovery of expenses incurred, or money paid for the use of the other party. Sprague v. Haines, 68 Tex. 215, 4 S. W. 371. Recovery for use and occupancy of land from one who has used it under a parol agreement which he

but prevents such a contract from being set up as a defense,[91] as for instance, in an action on the quantum meruit by a party who has partly performed under it,[92] or in an action in ejectment against one in possession of land under an oral contract.[93]

Who may Plead the Statute

The benefits of the statute of frauds are personal, and it can only be set up by the parties to the contract or their privies.[94]

Waiver of Statute

A contract not put in writing, as required by the statute of frauds, not being void, but simply unenforceable by suit, the failure of the contract to comply with the statute may be waived by the party to be charged.[95] It is generally held to have been waived if not pleaded as a defense, unless the complaint shows that the case is within the statute.[96]

refuses to carry out. Walker v. Shackelford, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; post, p. 650. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 275–277½.*

[91] Simons v. New Britain Trust Co., 80 Conn. 263, 67 Atl. 883, 11 Ann. Cas. 477. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 141; Cent. Dig. § 343.*

[92] King v. Welcome, 5 Gray (Mass.) 41; Baker v. Lauterbach, 68 Md. 64, 11 Atl. 704; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. 44; Lemon v. Randall, 124 Mich. 687, 83 N. W. 994. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 141; Cent. Dig. § 343.*

[93] Zeuske v. Zeuske, 55 Or. 65, 103 Pac. 648, 105 Pac. 249, Ann. Cas. 1913A, 556 (holding that the acts of part performance were available only in equity to take the case out of the statute). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 141; Cent. Dig. § 343.*

[94] Cahill v. Bigelow, 18 Pick. (Mass.) 369; Mewburn's Heirs v. Bass, 82 Ala. 622, 2 South. 520; Briggs v. United States, 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180; Dailey v. Kinsler, 35 Neb. 835, 53 N. W. 973; Best v. Davis, 44 Ill. App. 624; Grundies v. Kelso, 41 Ill. App. 200; Houser v. Lamont, 55 Pa. 311, 93 Am. Dec. 753; Book v. Mining Co. (C. C.) 58 Fed. 106; Bullion & Exch. Bank v. Otto (C. C.) 59 Fed. 256; Chicago Dock Co. v. Kinzle, 49 Ill. 289; King v. Bushnell, 121 Ill. 656, 13 N. E. 245; St. Louis, K. & N. W. R. Co. v. Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 143; Cent. Dig. §§ 344–350.*

[95] Montgomery v. Edwards, 46 Vt. 151, 14 Am. Rep. 618; Cosand v. Bunker, 2 S. D. 294, 50 N. W. 84; Westfall v. Parsons, 16 Barb. (N. Y.) 645; Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; Brakefield v. Anderson, 87 Tenn. 206, 10 S. W. 360; Sarwell v. Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 144; Cent. Dig. § 351.*

[96] Wells v. Monihan, 129 N. Y. 161, 29 N. E. 232; McClure v. Otrich, 118 Ill. 320, 8 N. E. 784; Cosand v. Bunker, 2 S. D. 294, 50 N. W. 84; Espalla v. Wilson, 86 Ala. 487, 5 South. 867; Cozart v. Land Co., 113 N. C. 294, 18 S. E. 337; Hamill v. Hall, 4 Colo. App. 290, 35 Pac. 927. The statute must be affirmatively pleaded. Birchell v. Neaster, 36 Ohio St. 331; Crane v. Powell, 139 N. Y. 379, 34 N. E. 911; Citty v. Manufacturing Co., 93 Tenn. 276, 24 S. W. 121, 42 Am. St. Rep. 919. But some courts hold that it may be raised

Conflict of Laws

By the rules of private international law the validity of a contract, so far as regards its formation, is determined by the lex loci contractus; but the procedure, including the proof, in an action on a contract is governed by the lex fori. In a leading English case, in which action was brought in England on a verbal contract made in France, and which was valid and enforceable by the French law, it was held that, as the statute of frauds did not go to the existence of the contract, but affected the procedure only, and prevented proof, the statute of frauds governed the case, and prevented a recovery.[97] This case has been followed by the courts of some of our states, and has been approved by the federal supreme court.[98] The courts of many other states, however, have held the contrary, and will enforce a contract so long as it is not within the statute of frauds of the state in which it was made, and, on the other hand, will refuse to enforce a contract which is not within their own statute, but is within the statute of the state in which it was made.[99]

SAME—CONTRACTS WITHIN SECTION 17

52. IN GENERAL. The seventeenth section of the English statute, which has been substantially followed in most of the states, enacts that "no contract for the sale of any goods, wares or merchandises, for the price of £10 sterling, or upwards, shall be allowed to be good, except

under a general denial. Fountaine v. Bush, 40 Minn. 141, 46 N. W. 465, 12 Am. St. Rep. 722; Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220. If the answer admits the contract, the statute must be pleaded. Iverson v. Cirkel, 36 Minn. 299, 57 N. W. 800; Barrett v. McAllister, supra. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 144; Cent. Dig. § 351.*

[97] Leroux v. Brown, 12 C. B. 801. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 120; Cent. Dig. § 268.*

[98] Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Hunt v. Jones, 12 R. I. 265, 34 Am. Rep. 635; Pritchard v. Norton, 106 U. S. 134, 1 Sup. Ct. 102, 27 L. Ed. 104; Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; Buhl v. Stephens (C. C.) 84 Fed. 922. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 120; Cent. Dig. § 268.*

[99] Dacosta v. Davis, 24 N. J. Law, 319; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; Denny v. Williams, 5 Allen (Mass.) 1; Allshouse v. Ramsay, 6 Whart. (Pa.) 331, 37 Am. Dec. 417; Houghtaling v. Ball, 20 Mo. 563; Low v. Andrews, 1 Story, 38, Fed. Cas. No. 8,559; Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 120; Cent. Dig. § 268.*

(a) "The buyer shall accept part of the goods so sold, and actually receive the same,
(b) "Or give something in earnest to bind the bargain, or in part payment,
(c) "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

53. EXECUTORY SALE. The section applies to executory contracts to sell as well as to executed contracts of sale.

54. WORK AND LABOR. It does not apply to contracts for work, labor, and materials, but a contract is not deemed to be one for work, labor, and materials,
(a) In England and some states, where it contemplates the ultimate transfer of the property in a chattel for a price, although the chattel is to be made.
(b) In most jurisdictions, where the chattel, although to be made, is one which the seller ordinarily makes and sells in the course of his business. It is otherwise if it is one which must be specially manufactured.
(c) In New York and some other states, where the chattel is in existence, although the seller is to adapt it to the use of the buyer.

SAME—WHAT ARE GOODS, WARES, AND MERCHANDISES

55. "Goods, wares, and merchandises" comprehend:
(a) All corporeal movable property.
(b) In the United States, generally (but not in England), incorporeal property, such as shares, bonds, notes, etc.
(c) Fructus naturales and fructus industriales, where the ownership is not to pass until after severance.
(d) Fructus industriales (perhaps) also where the ownership is to pass before severance.

The treatment of this section belongs more properly to a work on the law of sales, and the rules governing its application will be very briefly indicated.[1] While it is a part of the statute law of most of

[1] See Tiffany, Sales, 35–81.

the states, in others it has never been enacted or has been repealed, and is not now the law.[2]

Although there was doubt in England, to remove which a special statute was enacted, it has been held with us that the statute applies not only to executed contracts of sale, but also to executory contracts, as, for instance, where the goods are not specified, but are to be afterwards obtained by the seller, or selected and set apart to the purchaser.[3]

It also applies to sales at public auction as well as private sales;[4] and to contracts of barter or exchange.[5]

A contract for the sale of goods is not taken out of the operation of the statute by the fact that there are other stipulations to which the statute does not apply.[6] The contract must be for the sale of goods, and a promise, therefore, by the seller of bonds or other goods to take them back is not within the statute. It is a promise to rescind the sale, not a promise to sell.[7] So, also, a contract by which one of the parties is to purchase goods for the other at a certain price, the latter agreeing to receive and pay for them on delivery, is a contract of agency, and not of bargain and sale, and is, therefore, not within the statute.[8] Nor is an oral agreement for a trading venture, by which one party agrees to account to the other for half the profits in consideration that the other shall bear half the losses, within the statute.[9]

[2] It is not in force in Virginia, West Virginia, Kentucky, North Carolina, and other states. See Odom v. Clark, 146 N. C. 544, 60 S. E. 513. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 81; Cent. Dig. § 140.*

[3] Bennett v. Hull, 10 Johns. (N. Y.) 364; Lamb v. Crafts, 12 Metc. (Mass.) 353; Edwards v. Railroad Co., 48 Me. 379; Franklin v. Long, 7 Gill & J. (Md.) 407; Cason v. Cheely, 6 Ga. 554; Sawyer v. Ware, 36 Ala. 676; Mechanical Boiler-Cleaner Co. v. Kellner, 62 N. J. Law, 544, 43 Atl. 599. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 83–86; Cent. Dig. §§ 142–161.*

[4] Singstack's Ex'rs v. Harding, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669. See, also, ante, p. 112. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 154–161.*

[5] Franklin v. Matea Gold Min. Co., 158 Fed. 941, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 83–85; Cent. Dig. §§ 142–161.*

[6] Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 83–86; Cent. Dig. §§ 142–161.*

[7] Johnston v. Trask, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 154–161.*

[8] Hatch v. McBrien, 83 Mich. 159, 47 N. W. 214. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 154–161.*

[9] Coleman v. Eyre, 45 N. Y. 41; Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 154–161.*

Value

In most states the statute fixes the value of the goods under this section at $50; but in some the value is fixed at a greater or less amount, and in two, at least, all contracts of sale are within the statute.

Where several articles, all of which together exceed, but no one of which alone reaches, the value specified in the statute, are purchased independently at different times, each purchase is a separate contract, and is not within the statute; but it is otherwise if they are all purchased at the same time, in one and the same transaction.[10]

Contracts for Work, Labor, and Materials

A difficult question has arisen where labor has to be expended on the thing sold before the contract is executed, and the property transferred, as to whether the contract is for the sale of goods within the seventeenth section, or for work and labor, and therefore enforceable if to be performed within a year, so as not to be within the fourth section. The decisions on this question are not in accord.

In England it is held that the contract is for a sale of goods if it contemplates the ultimate transfer of the property in a chattel. "If the contract be such that it will result in the sale of a chattel," it was said in the leading English case, "the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor would be the proper remedy." [11]

The English rule has been followed to some extent in this country,[12] but in most jurisdictions it has been rejected.[13]

In some states it is held that a contract for the sale of something which the seller ordinarily makes and sells in the course of his business is a contract for the sale of goods, and not for work and labor, though he may not have the goods on hand, but may have to manufacture them; but, if the goods are not such as he ordinarily makes, and have to be specially manufactured for the buyer, the

[10] Baldey v. Parker, 2 Barn. & C. 37. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 85; Cent. Dig. § 141.*

[11] Lee v. Griffin, 1 Best & S. 272. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 83; Cent. Dig. §§ 147–153.*

[12] Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; Burrell v. Highleyman, 33 Mo. App. 183. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 83; Cent. Dig. §§ 147–153.*

[13] See cases cited post, notes 14, 15.

contract is for work and labor.[14] This is commonly called the Massachusetts rule and has been so generally adopted that it is sometimes referred to as the American rule.

By the New York rule, which also prevails in a few other states, a distinction is made between goods in existence when the contract is made and goods that have to be manufactured, and it is held that when the chattel is in existence the contract should be deemed one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and nonexisting chattels.[15]

In some states this question is regulated by special provisions of the statute.[16]

Goods, Wares, and Merchandises

In England the term "goods, wares, and merchandises" has been limited to corporeal movable property, and is held not to include shares of stock, choses in action, and other incorporeal rights and property,[17] and the courts of some of our states have taken the

[14] **HEINTZ v. BURKHARD**, 29 Or. 55, 43 Pac. 866, 31 L. R. A. 508, 54 Am. St. Rep. 777, Throckmorton Cas. Contracts, 94. Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112; Lamb v. Crafts, 12 Metc. (Mass.) 353; Mixer v. Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256; Atwater v. Hough, 29 Conn. 509, 79 Am. Dec. 229; Crockett v. Scribner, 64 Me. 447; Edwards v. Railroad Co., 48 Me. 379; Finney v. Apgar, 31 N. J. Law, 267; Central Lith. & E. Co. v. Moore, 75 Wis. 170, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. Rep. 186; Brown & Haywood Co. v. Wunder, 64 Minn. 450, 67 N. W. 357, 32 L. R. A. 593; Bauscher v. Gies, 160 Mich. 502, 125 N. W. 420; Moore v. Camden Marble & Granite Works, 80 Ark. 274, 96 S. W. 1063, 117 Am. St. Rep. 87, 10 Ann. Cas. 308. See, also, Mechanical Boiler-Cleaner Co. v. Kellner, 62 N. J. Law, 544, 43 Atl. 599. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 83; Cent. Dig. §§ 147–153.*

[15] Parsons v. Loucks, 48 N. Y. 17, 8 Am. Rep. 517; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619; Deal v. Maxwell, 51 N. Y. 652; Higgins v. Murray, 73 N. Y. 252; Alfred Shrimpton & Sons v. Dworsky, 2 Misc. Rep. 123, 21 N. Y. Supp. 461; Eichelberger v. McCauley, 5 Har. & J. (Md.) 213, 9 Am. Dec. 514; Rentch v. Long, 27 Md. 188. And see Wallace v. Dowling, 86 S. C. 307, 68 S. E. 571, 138 Am. St. Rep. 1054. A contract to paint a portrait is not within the statute. Turner v. Mason, 65 Mich. 662, 32 N. W. 846. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 83; Cent. Dig. §§ 147–153.*

[16] Mighell v. Dougherty, 86 Iowa, 480, 53 N. W. 402, 17 L. R. A. 755, 41 Am. St. Rep. 511. In some states the statute expressly excepts goods to be manufactured. Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 81, 83; Cent. Dig. §§ 140, 147–153.*

[17] Humble v. Mitchell, 11 Adol. & E. 205. And see Pickering v. Appleby, Comyn, 354. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

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same view.[18] In other states it is held that shares of stock, promissory notes, bonds, and the like, are "goods, wares, and merchandise."[19] It has also been held that a sale of book accounts,[20] or of land scrip,[21] is within the statute, but not an agreement for sale of an interest in an invention before letters patent are obtained.[22] In some states the statute uses the words "personal property," and these would, of course, apply to choses in action.[23] In other states the statute expressly mentions choses in action.

As we have already seen, "fructus industriales" are not an interest in land, within the fourth section.[24] They are chattels, but it is an open question whether they are "goods, wares, and merchandises," within the seventeenth section.[25] So, also, a sale of "fructus naturales," or the natural growth of land, not being of an interest in land where title is not to pass until after severance, is regarded as within the seventeenth section. Some courts, indeed, hold this to be so though title is to pass before severance.[26] The question, however, is intricate, and the authorities conflicting, and it cannot be properly treated at any length in an elementary work on contracts.

[18] Whittemore v. Gibbs, 24 N. H. 484; Vawter v. Griffin, 40 Ind. 593; Webb v. Railroad Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

[19] Tisdale v. Harris, 20 Pick. (Mass.) 9; Boardman v. Cutter, 128 Mass. 388; BALDWIN v. WILLIAMS, 3 Metc. (Mass.) 365, Throckmorton Cas. Contracts, 92; Gooch v. Holmes, 41 Me. 523; Hudson v. Weir, 29 Ala. 294; Pray v. Mitchell, 60 Me. 430; North v. Forest, 15 Conn. 400; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337; Bernhardt v. Walls, 29 Mo. App. 206; Greenwood v. Law, 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688; Meehan v. Sharp, 151 Mass. 564, 24 N. E. 907; Sprague v. Hosie, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

[20] Walker v. Supple, 54 Ga. 178. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

[21] Smith v. Bouck, 33 Wis. 19. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

[22] Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Blakeney v. Goode, 30 Ohio St. 350. But see Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

[23] Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 143–146.*

[24] Ante. p. 94.

[25] See Tiffany, Sales, 48, and cases cited.

[26] Ante, p. 94.

SAME—ACCEPTANCE AND RECEIPT

56. To satisfy this exception there must be both

(a) Acceptance, which in this country means assent by the buyer that the goods are to be taken by him in performance of the contract, and

(b) Receipt, or the taking of possession of the goods by the buyer with the seller's consent, either by actual delivery or by agreement.

Acceptance and receipt are distinct, and to satisfy this exception both are essential.[27] Acceptance may precede receipt,[28] or vice versa,[29] and both may be subsequent to the contract of sale.[30] Their effect is to prove that there is a contract, the terms of which may then be proved by parol.[31] Acceptance and receipt of a part, however small, is sufficient.[32]

Acceptance

Acceptance, as the meaning imports, is an assent by the buyer, meant to be final, that the goods are to be taken by him under and

[27] Smith v. Hudson, 6 Best & S. 431; Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Cooke v. Millard, 65 N. Y. 352, 367, 22 Am. Rep. 619; Maxwell v. Brown, 39 Me. 98, 63 Am. Dec. 605; Patterson & Holden v. Sargeant, Osgood & Roundy Co., 83 Vt. 516, 77 Atl. 338, 138 Am. St. Rep. 1102. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 165–179.*

[28] Cusack v. Robinson, 1 Best & S. 299; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Knight v. Mann, 118 Mass. 143, 145; Simpson v. Krumdick, 28 Minn. 352, 355, 10 N. W. 18. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 165–179.*

[29] Beaumont v. Brengeri, 5 C. B. 301; Garfield v. Paris, 96 U. S. 557, 563, 24 L. Ed. 821; Vincent v. Germond, 11 Johns. (N. Y.) 283; Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279; Townsend v. Hargraves, 118 Mass. 325, 332 *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 165-179.*

[30] Gault v. Brown, 48 N. H. 183, 188, 2 Am. Rep. 210; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Marsh v. Hyde, 3 Gray (Mass.) 331; Bush v. Holmes, 53 Me. 417; McCarthy v. Nash, 14 Minn. 127 (Gil. 95); Gabriel v. Kildare Elevator Co., 18 Okl. 318, 90 Pac. 10, 10 L. R. A. (N. S.) 638, 11 Ann. Cas. 517. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 165–179.*

[31] Tomkinson v. Straight, 17 C. B. 697; Garfield v. Paris, 96 U. S. 557, 566, 24 L. Ed. 821. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 165–179.*

[32] Garfield v. Paris, supra; Damon v. Osborn, 1 Pick. (Mass.) 476, 11 Am. Dec. 229; Patterson & Holden v. Sargeant, Osgood & Roundy Co., 83 Vt. 516, 77 Atl. 338, 138 Am. St. Rep. 1102. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 165–179.*

in performance of the contract.[83] If the contract is for sale of specific goods, acceptance necessarily takes place when the contract is entered into.[84] If the contract is for sale of goods which are not specific, there can be no acceptance until the seller has indicated what goods he intends to deliver, and thereafter an acceptance may be shown by the buyer's declarations,[85] or by any dealing with them as owner.[86] A mere examination of the goods, however, for the purpose of ascertaining whether they comply with the terms of an express or implied warranty of the contract of sale does not constitute an acceptance.[87] In England a highly artificial construction has in the later cases been put upon "acceptance," and it is held that any dealing with the goods which recognizes a pre-existing contract of sale is an acceptance,[88] but this later construction has never been adopted in the United States.

Actual Receipt

Where acceptance is shown, a very liberal construction is placed on actual receipt. Receipt implies delivery, and must be with the seller's consent, and with the intention of transferring possession to the buyer as owner. The test is whether the seller has parted with his lien.[89] When the goods are to be forwarded to the buy-

[83] Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Meehon v. Sharp, 151 Mass. 564, 24 N. E. 907; Smith v. Fisher, 59 Vt. 53, 7 Atl. 816; Garfield v. Paris, 96 U. S. 567, 24 L. Ed. 821. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 165–173.*

[84] Cases cited supra, note 28.

[85] Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Shepherd v. Pressey, 32 N. H. 49; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771; Galvin v. MacKenzie, 21 Or. 184, 27 Pac. 1039. It is sometimes said that mere words are not enough, but the cases in which such statements occur generally involve simply the proposition that they are not enough to constitute acceptance and receipt. Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316. See Tiffany, Sales, 56. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 165–173.*

[86] Chaplin v. Rogers, 1 East. 195; Phillips v. Ocmulgee Mills, 55 Ga. 633; Bacon v. Eccles, 43 Wis. 227, 238; Sullivan v. Sullivan, 70 Mich. 583, 38 N. W. 472; Patterson & Holden v. Sargeant, Osgood & Roundy Co., 83 Vt. 516, 77 Atl. 338, 138 Am. St. Rep. 1102. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 165–173.*

[87] KEMENSKY v. CHAPIN, 193 Mass. 500, 79 N. E. 781, 9 Ann. Cas. 1168, Throckmorton Cas. Contracts, 97. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 165–173.*

[88] Page v. Morgan, 15 Q. B. Div. 228; Taylor v. Smith [1893] 2 Q. B. 65. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 165–173.*

[89] Phillips v. Bristolli, 2 Barn. & C. 511; Safford v. McDonough, 120 Mass. 290; Marsh v. Rouse, 44 N. Y. 643; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

er, if they are carried by the seller's servant or agent, there is no transfer of possession while they remain in his hands;[40] but if they are forwarded by a carrier designated by the buyer, an actual receipt takes place when they are delivered to him for carriage;[41] and if they are forwarded by common carrier, he, in the absence of special agreement, is the agent of the buyer and the result is the same.[42] The receipt of the goods by the carrier in such cases, on the other hand, is not an acceptance, such an agent having authority only to receive, and not to accept.[43]

The possession of the goods may be transferred, and an actual receipt take place by agreement, without physical delivery. An actual receipt takes place by agreement: (1) When the goods are in the actual possession of the seller, if he becomes bailee of the goods for the buyer;[44] (2) when the goods are in the custody of the buyer, as bailee of the seller, if with the consent of the seller he ceases to hold as bailee, and holds them as owner;[45] (3) when the goods are in the custody of a third person as bailee of the seller, if such third person, with the consent of the seller and the buyer, becomes bailee of the buyer;[46] and (4) when the goods are not

[40] Agnew v. Dumas, 64 Vt. 147, 23 Atl. 634; Grey v. Cary, 9 Daly (N. Y.) 363. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 165–173.*

[41] Bullock v. Tschergi (C. C.) 4 McCrary, 184, 13 Fed. 345; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721. See cases infra, note 43. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[42] Wait v. Baker, 2 Ex. 1; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[43] KEMENSKY v. CHAPIN, 193 Mass. 500, 79 N. E. 781, 9 Ann. Cas. 1168, Throckmorton Cas. Contracts, 97; Hanson v. Armitage, 5 Barn. & Ald. 557; Hunt v. Hecht, 8 Ex. 814; Allard v. Greasert, 61 N. Y. 1, 5; Fontaine v. Bush, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[44] Elmore v. Stone, 1 Taunt. 458; Beaumont v. Brengeri, 5 C. B. 301; Green v. Merriam, 28 Vt. 801; Rodgers v. Jones, 129 Mass. 420; Webster v. Anderson, 42 Mich. 554, 4 N. W. 288, 36 Am. Rep. 452. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[45] Edan v. Dudfield, 1 Q. B. 306; Lillywhite v. Devereux, 15 Mees. & W. 285; Snider v. Thrall, 56 Wis. 674, 14 N. W. 814; Godkin v. Weber, 154 Mich. 207, 114 N. W. 924, 117 N. W. 628, 20 L. R. A. (N. S.) 498.

But the mere fact that the goods are in the possession of the purchaser at the time of the sale does not of itself constitute such a receipt and acceptance as will satisfy the statute, unless it is so agreed by the parties, or the sale is followed by acts of ownership on the part of the purchaser. J. H. Silkman Lumber Co. v. Hunholz, 132 Wis. 610, 112 N. W. 1081, 11 L. R. A. (N. S.) 1186 and note, 122 Am. St. Rep. 1008, 13 Ann. Cas. 713. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[46] Bentall v. Burn, B. & C. 423; Farina v. Home, 16 Mees. & W. 119;

in the custody of any person, as timber at a public wharf, or logs floating in a river, and the buyer and the seller agree that the possession is transferred.[47]

SAME—EARNEST AND PART PAYMENT

57. **EARNEST.** Earnest is something of value given and received to mark the final assent of the parties to the bargain.

58. **PART PAYMENT.** Part payment may be made at or (unless the statute otherwise requires) subsequently to the time of the contract, either in money or anything of value.

Earnest is money or some gift or token delivered to mark the assent to the bargain.[48] The practice of giving earnest was formerly prevalent in England, and, as the term was originally used, it was regarded as distinct from part payment.[49] Now, however, the custom of giving something aside from a part of the purchase money "to bind the bargain" has fallen into disuse, and the word "earnest" is commonly interpreted as synonymous with part payment.[50]

Part payment may be subsequent to the contract,[51] unless, as in some states, the statute provides that it must be given at the time of the contract.[52] It must be accepted.[53] It need not be money,

Townsend v. Hargraves, 118 Mass. 325, 332; Bassett v. Camp, 54 Vt. 232. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[47] Tansley v. Turner, 2 Bing. N. C. 151; Cooper v. Bill, 3 H. & C. 722; Leonard v. Davis, 1 Black, 476, 17 L. Ed. 222; Boynton v. Veazie, 24 Me. 286; Kingsley v. White, 57 Vt. 565; Brewster v. Leith, 1 Minn. 56 (Gil. 40). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 90; Cent. Dig. §§ 162–179.*

[48] Brac. 1, 2, c. 27.

[49] Benj. Sales (6th Am. Ed.) § 189; Howe v. Smith, 27 Ch. D. 89, 101. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 94; Cent. Dig. § 182.*

[50] Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; Groomer v. McMillan, 143 Mo. App. 612, 128 S. W. 285. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 94; Cent. Dig. § 182.*

[51] Walker v. Nussey, 16 Mees. & W. 302; Thompson v. Alger, 12 Metc. (Mass.) 428, 435; Marsh v. Hyde, 3 Gray (Mass.) 331. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–185.*

[52] Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508; Id., 84 N. Y. 549, 38 Am. Rep. 544; Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65; Kerkhof v. Paper Co., 68 Wis. 674, 32 N. W. 766; Gabriel v. Kildare Elevator Co., 18 Okl. 318, 90 Pac. 10, 10 L. R. A. (N. S.) 638, 11 Ann. Cas. 517; Franklin v. Matoa Gold Min. Co., 158 Fed. 941, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302 (Colorado Statute). *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–185.*

[53] Edgerton v. Hodge, 41 Vt. 676. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–185.*

but may be anything of value, which by mutual agreement is given and accepted on account or in part satisfaction of the price.[54] It may, for example, be in the form of a credit on indebtedness of the seller.[55] But whatever is relied upon to constitute payment must be accepted as absolute payment, and the delivery of a check does not constitute payment unless it is agreed by the parties that it is to be accepted as absolute, and not merely as conditional payment.[56]

SAME—FORM REQUIRED

59. The rules as to the form required by section 17 are the same as in case of section 4, except that the consideration of the promise of the party to be charged need not appear.

The note or memorandum is sufficient if it comply with the rules already stated with reference to the form required by section 4. It is not necessary, however, that the consideration of the promise of the party to be charged be stated; in other words, if the memorandum contains his promise, it need make no reference to the promise of the other party.[57] So if a letter or memorandum in the form of an offer states the terms of the proposed contract, the acceptance need not repeat the terms,[58] and indeed may even be made orally.[59] But the price is a material part of the bargain, and must

[54] White v. Drew, 56 How. Prac. (N. Y.) 53; Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24. Surrender of seller's note, Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832; transfer of bill or note, Griffiths v. Owen, 13 Mees. & W. 58; under statute requiring payment at time, delivery of check, Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–185.*

[55] Johnson v. Tabor, 101 Miss. 78, 57 South. 365. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–185.*

[56] Groomer v. McMillan, 143 Mo. App. 612, 128 S. W. 285. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 183–185.*

[57] Edgerton v. Mathews, 6 East, 307; Sarl v. Bourdillon, 1 C. B. N. S. 188; Smith v. Ide, 3 Vt. 290; Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

[58] Jennings v. Shertz, 45 Ind. App. 120, 88 N. E. 729. *See "Frauds, Statute of," Dec. Dig. (Key-No.) §§ 108, 112; Cent. Dig. §§ 214–221, 238.*

[59] Reuss v. Picksley, L. R. 1 Ex. 342; Sanborn v. Flagler, 9 Allen (Mass.) 474; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; Kessler v. Smith, 42 Minn. 494, 44 N. W. 794. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 192–208.*

be stated,[60] though if it be not agreed upon, but is implied, a memorandum which states no price is sufficient.[61]

SAME—EFFECT OF NONCOMPLIANCE

60. As in case of section 4, it is generally held that failure to comply with the provisions of section 17 does not render the contract void, but merely prevents its enforcement.

This section declares that, if there be no acceptance and receipt, no earnest or part payment, and no note or memorandum, the contract shall not "be allowed to be good," thus differing from section 4, which merely declares that no action shall be brought. In England it seems not to have been directly decided whether these words mean that the contract shall be utterly void, or merely incapable of being sued upon, as in case of contracts under section 4; and the dicta of the judges are conflicting. The latter position is sustained by the weight of opinion.[62] In Massachusetts, where the statute provided that no such contract should be "good or valid," it has been held that the difference in the wording of the two sections was immaterial, and that failure of a contract to comply with the requirements of section 17 does not go to its existence, but merely renders it unenforceable by suit, as under the fourth section.[63] In Missouri, however, it has been held that section 17 goes to the very existence of the contract.[64] In some states the statute declares that the contract shall be "void."

[60] KEMENSKY v. CHAPIN, 193 Mass. 500, 79 N. E. 781, 9 Ann. Cas. 1168, Throckmorton Cas. Contracts, 97; Elmore v. Kingscote, 5 B. & C. 583; Ashcroft v. Butterworth, 136 Mass. 511; Stone v. Browning, 68 N. Y. 598; Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841; Glasgow Milling Co. v. Burgher, 122 Mo. App. 14, 97 S. W. 930. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[61] Hoadley v. McLaine, 10 Bing. 482; Ashcroft v. Morrison, 4 M. & G. 450. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 112; Cent. Dig. § 238.*

[62] Anson, Cont. (4th Ed.) 67; Pol. Cont. 605.

[63] Townsend v. Hargraves, 118 Mass. 325; Wainer v. Insurance Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. See, also, Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571; ante, p. 114. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 275–277½.*

[64] Houghtaling v. Ball, 20 Mo. 563. See, also, Green v. Lewis, 26 U. C. Q. B. 618. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 275–277½.*

CHAPTER V

CONSIDERATION

61, 62. Consideration Defined.
63, 64. Necessity for Consideration, and Presumption.
65, 66. Adequacy of Consideration.
67. Sufficiency or Reality of Consideration.
68–70. Mutual Promises—Mutuality.
71–73. Forbearance to Exercise a Right.
74–76. Doing What One is Bound to Do.
77, 78. Impossible and Vague Promises.
79. Legality of Consideration.
80. Consideration in Respect of Time—Past Consideration.

CONSIDERATION DEFINED

61. Consideration is that which moves from the promisee, or to the promisor, at the express or implied request of the latter, in return for his promise.

62. As the term is used in the law of contract, it means a "valuable" consideration; that is, something having value in the eye of the law. It may consist either in "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

The law requires every simple contract to be based on what it deems a valuable consideration. We shall take up in turn the different forms which consideration may assume, and explain at length what is deemed a consideration.[1] At the outset, however, it will be well to explain in a general way what we mean when we speak of the consideration for a promise. Consideration means that which moves from the promisee, or to the promisor, at the latter's request, in return for his promise. Consideration "is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise."[2] If, for instance, one man, by paying another a sum of money, procures a promise from the latter in return to do something for his benefit, the money paid is the consideration for the promise. Considera-

[1] For the history of consideration, the student should read Anson, Cont. (8th Ed.) 43; Poll. Cont. 179; Holmes, Com. Law, 253–271, 284–287.

[2] Anson, Cont. (8th Ed.) 74.

tion, however, need not be the payment of money. As usually defined, it may consist "in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other;" [3] provided, however, the benefit conferred or detriment suffered is deemed of value in the eye of the law.[4] Strictly speaking, however, the accrual of a right or benefit to the promisor is not necessary to establish a consideration, and the one essential test in all cases is that of forbearance, detriment, or responsibility suffered or undertaken by the promisee.[5]

If a person does work for another on the latter's express or implied promise to pay for it, or gives another permission to use his property in return for a promise, or gives up his right to sue another, on the latter's promise to pay money or do some other act, there is in each case either a benefit accruing to the promisor, or a detriment suffered by the promisee, or both; and this is the consideration for the promise. So, also, if a person promises another to do something on the latter's promising him to do something, as where one man promises another to sell him goods, and the promisee promises to buy them, and pay for them, a right is conferred by each to the benefit of the other's promise, and a responsibility is undertaken by each. The promise of each is the consideration for the promise of the other.[6]

The fact that the benefit conferred or detriment suffered is

[3] Currie v. Misa, L. R. 10 Exch. 162. See, also, Bainbridge v. Firmstone, 8 Adol. & E. 743; Handrahan v. O'Regan, 45 Iowa, 298; Devecmon v. Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; HAMER v. SIDWAY, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, Throckmorton Cas. Contracts, 100; Byrne v. Cummings, 41 Miss. 192; Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Sanders v. Carter, 91 Ga. 450, 17 S. E. 345; Dorwin v. Smith, 35 Vt. 69; Train v. Gold, 5 Pick. (Mass.) 380; Emerson v. Slater, 22 How. 43, 16 L. Ed. 360; Taylor v. Williams, 120 Ind. 414, 22 N. E. 118; Marshalltown Stone Co. v. Manufacturing Co., 114 Iowa, 574, 87 N. W. 496; Gunther v. Gunther, 181 Mass. 217, 63 N. E. 402; Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689. And see the old cases of Traver v. ——— (1667) 1 Sid. 57; Paynter v. Chamberlyn (1639) 1 Rolle, Abr. 22; Hawes v. Smith (1675) 2 Lev. 122. *See "Contracts," Dec. Dig. (Key-No.) §§ 50–52; Cent. Dig. §§ 222–224.*

[4] Post, p. 140.

[5] Henry v. Dussell, 71 Neb. 691, 99 N. W. 484. And see Pollock, Cont. 166; HAMER v. SIDWAY, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, Throckmorton Cas. Contracts, 100. *See "Contracts," Dec. Dig. (Key-No.) §§ 50–52; Cent. Dig. §§ 222–224.*

[6] Funk v. Hough, 29 Ill. 145; Earle v. Angell, 157 Mass. 294, 32 N. E. 164. And see post, p. 145. *See "Contracts," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 344–353.*

slight does not render it any the less a valuable consideration.[7] The naming of a child after a person will support his promise to pay a large sum of money.[8]

Consideration Distinguished from Motive

"Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law, moving from" the promisee.[9] Confusion between motive and consideration has, however, sometimes arisen, and has taken two forms: (1) The distinction which once existed between "good" and "valuable" consideration; and (2) the view which once maintained that a moral obligation was sufficient to support a promise.

Same—Good Consideration

Natural affection for a near relative, or, as it is generally said, the consideration of blood, or natural love and affection, is said to be a "good," but not a "valuable," consideration.[10] In the law of contract the consideration must be "valuable." In some early English cases it was attempted to ingraft the doctrine of good consideration, which had been applied in cases of covenants to stand seised, upon the law of contract, but it was not allowed. The mere existence of natural affection as a motive for a promise has probably never been held to amount to a valuable consideration, so as to support an executory contract.[11]

[7] State v. Baker, 8 Md. 44. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 242.*

[8] Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; Daily v. Minnick, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 251.*

[9] Thomas v. Thomas, 2 Q. B. 851. See, also, Philpot v. Gruninger, 14 Wall. 570, 20 L. Ed. 743. *See "Contracts," Dec. Dig. (Key-No.) § 50; Cent. Dig. § 222.*

[10] Chit. Cont. 27. "A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded in motives of justice. Deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favor of creditors and bona fide purchasers." 2 Bl. Comm. 297.

[11] Bret v. J. S. and Wife, Cro. Eliz. 755; Fink v. Cox, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191; Priester v. Priester, Rich. Eq. Cas. (S. C.) 26, 18 Am. Dec. 191; Kirkpatrick v. Taylor, 43 Ill. 207; Smith v. Kittridge, 21 Vt. 238; Phillips v. Frye, 14 Allen (Mass.) 36; Pennington v. Gittings, 2 Gill & J. (Md.) 208; Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Whitaker v. Whitaker, 52 N. Y. 368, 11 Am. Rep. 711; Cotton v. Graham, 84 Ky. 672, 2 S. W. 647; Hadley v. Reed, 58 Hun, 608, 12 N. Y. Supp. 163; Williams v. Forbes, 114 Ill. 167, 28 N. E. 463; Wilbur v. Warren, 104 N. Y. 196, 10 N. E. 263. *See "Contracts," Dec. Dig. (Key-No.) § 77; Cent. Dig. §§ 286–290.*

It was formerly held that if a person for whose benefit a binding promise was made was nearly related to the promisee, the relationship and the fact that the contract was prompted by natural affection would give a right of action to the beneficiary. This exception to the rule that a contract cannot confer rights upon a person who is not a party to it is no longer generally recognized.[12] The question of the right of a third person who did not furnish the consideration to sue upon a promise made for his benefit will be considered in discussing the operation of contract.[13]

Same—Moral Obligation

There are some cases to the effect that a mere moral obligation is sufficient consideration to support a promise,[14] but it is now well settled to the contrary.[15] A man may believe himself to be under a moral obligation, either because he has received actual benefits in the past, or from motives of piety, delicacy, or friendship. Now, a past consideration, as will be seen,[16] is in truth no consideration at all, for the promisor does not receive a benefit, nor the promisee suffer a detriment, in return for the promise. There are certain exceptions to this statement, which will be noticed in treating of past consideration, but it will be seen that the validity of the promise in those cases does not properly rest on the basis of moral obligation, though some courts put it upon that ground. The insufficiency of past benefits to support a promise on the ground of moral obligation was settled in England in a case in which it was said: "The doctrine would annihilate the necessity for any consideration

[12] Post, p. 444.

[13] Post, pp. 442–452.

[14] Hawkes v. Saunders, Cowp. 289; Lee v. Muggeridge, 5 Taunt. 36; Clark v. Herring, 5 Binn. (Pa.) 35; Glass v. Beach, 5 Vt. 173; State v. Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; Drury v. Briscoe, 42 Md. 162; Musser v. Ferguson Tp., 55 Pa. 475; In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943. And see Brown v. Latham, 92 Ga. 280, 18 S. E. 421; Lawrence v. Oglesby, 176 Ill. 122, 52 N. E. 945. See post, p. 175. *See "Contracts," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 357–381.*

[15] Eastwood v. Kenyon, 11 Adol. & E. 438; Mills v. Wyman, 3 Pick. (Mass.) 207; Beaumont v. Reeve, 8 Q. B. 483; Ehle v. Judson, 24 Wend. (N. Y.) 97; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Valentine v. Foster, 1 Metc. (Mass.) 520, 35 Am. Dec. 377; Updike v. Titus, 13 N. J. Eq. 151; Farnham v. O'Brien, 22 Me. 475; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; Gay v. Botts, 13 Bush (Ky.) 299; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Osier v. Hobbs, 33 Ark. 215; McElven v. Sloan, 56 Ga. 208; Trimble v. Rudy, 60 S. W. 650, 22 Ky. Law Rep. 1406, 53 L. R. A. 353, and note. A promise by a husband to his wife on her deathbed that their son should have certain property is not a valuable consideration for a conveyance from the father to the son. Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244. See post, p. 175, note 88. *See "Contracts," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 357–381.*

[16] Post, p. 170.

at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." [17]

If the actual receipt of a benefit in the past does not constitute consideration for a subsequent promise, still less will such duties of honor, conscience, or friendship as a man may conceive to be incumbent on him. A man may be bound in honor to pay money lost in a wager, but, inasmuch as the law has declared wagers to be void, a promise to pay such a debt would be unenforceable for want of a consideration.[18] In like manner, a pious wish on the part of executors to carry out the intentions of the testator is no consideration for promises made by them.[19]

NECESSITY FOR CONSIDERATION, AND PRESUMPTION

63. NECESSITY—A valuable consideration is essential to the validity of every simple contract.

EXCEPTION—Want of consideration does not avoid a negotiable instrument in the hands of a bona fide purchaser for value.

64. PRESUMPTION—Negotiable instruments are by the law merchant deemed prima facie to have been issued for a valuable consideration; and by statute in some jurisdictions the same is true of all other simple contracts in writing, and of contracts under seal in those jurisdictions where the common-law effect of a seal has been abolished.

Consideration is the universal requisite of all contracts not under seal, except the so-called "contracts of record," which, like contracts under seal, derive their validity from their form alone.[20]

[17] Eastwood v. Kenyon, 11 Adol. & E. 438.

[18] Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553. *See "Contracts," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 357–359; "Gaming," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 39–44.*

[19] Anson, Cont. (4th Ed.) 79; Thomas v. Thomas, 2 Q. B. 851. *See "Contracts," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 357–381.*

[20] RANN v. HUGHES, 7 Term R. 346, Throckmorton Cas. Contracts, 84; Cooke v. Oxley, 3 Term R. 653; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Doebler v. Waters, 30 Ga. 344; Lowe v. Bryant, 32 Ga. 235; Oullahan v. Baldwin, 100 Cal. 648, 35 Pac. 310; Branson v. Kitchenman, 148 Pa. 541, 24 Atl. 61; McLean v. McBean, 74 Ill. 134; Baer v. Christian, 83 Ga. 322, 9 S. E. 790; Bailey v. Walker, 29 Mo. 407; Hendy v. Kier, 59 Cal. 138; Culver v. Banning, 19 Minn. 303 (Gil. 260); In re James, 78 Hun, 121, 28 N. Y. Supp. 902. *See "Contracts," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 220, 221, 256–258.*

The rule applies to all simple contracts,[21] including those contracts which are required to be in writing, either by the statute of frauds, or by other statutes, or by the common law. It was at one time doubted whether a promise not under seal needed a consideration if it was put in writing,[22] but the necessity for a consideration was affirmed and settled in England in 1778 in a suit against an administratrix who, without consideration, had promised in writing to answer damages out of her own estate. It was contended that the writing required by the statute of frauds rendered consideration unnecessary, but the contrary was held. "It is undoubtedly true," it was said, "that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is 'nudum pactum ex quo non oritur actio;' and, whatever may be the sense of this maxim in the civil law, it is in the last sense only that it is to be understood in our law. * * * All contracts are, by the law of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved." [23]

Negotiable Instruments

Bills of exchange, promissory notes, and other negotiable instruments are to some extent an exception to this rule.

As between the immediate parties to the instrument considera-

[21] Cooley v. Moss, 123 Ga. 707, 51 S. E. 625, holding that a written contract signed by the parties is not binding on a party as to whom it is without consideration. The guaranty of another's debt must be supported by a consideration. In these contracts there are two considerations—a consideration for the original contract, and a consideration for the guaranty. See Briggs v. Latham, 36 Kan. 205, 13 Pac. 129. If, however, as we have seen, a note, for instance, is guarantied by a third person before its delivery to the payee, the consideration from the payee to the maker is sufficient to support the guaranty as well as the note. Winans v. Manufacturing Co., 48 Kan. 777, 30 Pac. 163; Heyman v. Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257. *See "Contracts," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 220, 221, 256–258.*

[22] Pillans v. Van Mierop (A. D. 1765) 3 Burrows, 1663. *See "Contracts," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 220, 221, 256–258.*

[23] RANN v. HUGHES, 7 Term R. 350, Throckmorton Cas. Contracts, 34. See, also, Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; In re Hess' Estate, 150 Pa. 346, 24 Atl. 676; Brown v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Perrine v. Cheeseman, 11 N. J. Law, 174, 19 Am. Dec. 388; Train v. Gold, 5 Pick. (Mass.) 380; Eddy v. Roberts, 17 Ill. 505. *See "Contracts," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 220, 221, 256–258.*

tion is necessary. Consideration, however, is said to be presumed —that is, the instrument itself is prima facie evidence of consideration; but the defendant may introduce evidence in rebuttal of the presumption, and if he can show that no consideration was given for his making or indorsement of the instrument his promise fails.[24] The rule is the same when the party suing is a subsequent holder, unless he is a purchaser for value before maturity without notice, in which case want of consideration is not a defense.[25]

Gratuitous Employment

"The promise of a gratuitous service, although not enforceable as a promise, involves a liability to use ordinary care and skill in performance"; [26] or, as it is usually put, the promisee is not liable for nonfeasance, but is liable for misfeasance, and this is sometimes said to be another exception to the rule that consideration is necessary to the validity of every simple contract. The ground of this liability is somewhat obscure. Where a person delivers over property to a bailee or agent, it is perhaps possible to find a consideration in the detriment which the bailor or principal suffers in parting with control.[27] But in the mere case of gratuitous service or agency, this element of consideration, if such it be, does not exist. It is sometimes said that the trust and confidence reposed is a sufficient consideration,[28] but if this were so it would be a sufficient consideration for the promise to perform, and render the promisee liable for nonfeasance. It must be admitted that the liability in these cases arises independently of any consideration to support the undertaking. Whether this liability is to be regarded as an anomaly in the law of contract [29] or as arising independently of contract [30] need not be considered.

Statutory Presumption of Consideration

In some states, statutes have been enacted declaring that all written instruments shall be presumptive evidence of a consideration, rebuttable, however, by showing that there was in fact no consid-

[24] Norton, Bills & N. (3d Ed.) 270. [25] Id. 276.

[26] Anson, Contr. (8th Ed.) 76, 83. See, also, Wilkinson v. Coverdale, 1 Esp. 75; Thorne v. Deas, 4 Johns. (N. Y.) 84; Walker v. Smith, 1 Wash. C. C. 152, Fed. Cas. No. 17,086; Williams v. Higgins, 30 Md. 404; Passano v. Acosta, 4 La. 26, 23 Am. Dec. 470; Spencer v. Towles, 18 Mich. 9; Isham v. Post, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766. *See "Contracts," Dec. Dig. (Key-No.) § 61; Cent. Dig. §§ 252, 253.*

[27] Coggs v. Bernard, 2 Ld. R. 909; Whitehead v. Greetham, 2 Bing. 464. *See "Contracts," Dec. Dig. (Key-No.) § 62; Cent. Dig. §§ 260–272.*

[28] Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 233–255, 291–315.*

[29] Anson, Contr. (8th Ed.) 85.

[30] "Gratuitous Undertakings," by Joseph H. Beale, Jr., 5 Harv. L. R. 222.

eration, thereby putting all simple contracts in writing, to this extent, on a level with negotiable instruments.[31] The statutory changes in the law in respect to instruments under seal have already been referred to.[32]

ADEQUACY OF CONSIDERATION

65. The validity of the contract is not dependent upon the adequacy of the consideration, provided it is something of value in the eye of the law.[33]

66. In equity, inadequacy of consideration, if such as to be evidence of fraud, is ground for refusing specific performance; and inadequacy of consideration is regarded as corroborative evidence in suits for relief from contracts on the ground of fraud and undue influence.

In General

At law the benefit conferred or detriment suffered by the promisee in exchange for the promise need not be equal to the responsibility assumed by the promisor; or, in other words, the consideration need not be adequate. Any real consideration, however small, will support a promise.[34] So long as a man gets what he has bargained for, and it is of some value in the eye of the law, the courts will not ask what its value may be to him, or whether its value is in any way proportionate to his act or promise given in return, for this would be "the law making the bargain instead of leaving the parties to make it."[35] In a case in the supreme court of the United States, Mr. Justice Story said, in speaking of a guaranty of another's debt, made in consideration of one dollar: "A valuable consideration, however small or nominal, if given or stipulated for in

[31] There are such statutes in California, Indiana, Iowa, Kansas, Kentucky, Missouri, and possibly in other states.

[32] Ante, p. 73.

[33] Anson, Cont. (8th Ed.) 76.

[34] Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16. *See "Contracts," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 231, 232.*

[35] Pilkington v. Scott, 15 Mees. & W. 660; Worth v. Case, 42 N. Y. 362; Hubbard v. Coolidge, 1 Metc. (Mass.) 84; Brooks v. Ball, 18 Johns. (N. Y.) 337; Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Earl v. Peck, 64 N. Y. 596; Dorwin v. Smith, 35 Vt. 69; Boggs v. Wann (C. C.) 58 Fed. 681; Eyre v. Potter, 15 How. 42, 14 L. Ed. 592; Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956; Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591; Bigelow v. Bigelow, 95 Me. 17, 49 Atl. 49; Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212. *See "Contracts," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 231, 232.*

good faith, is, in the absence of fraud, sufficient to support an action on any parol contract. * * * A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid." [86]

Forbearance by a creditor, for instance, to levy an execution on the debtor's property, will support a promise by the debtor or by a third person to pay a larger sum than could have been recovered under the execution. "If," said Lord Tenterden in such a case, "the inconvenience of an execution against these goods at the time in question was so great that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise." [87]

There may even be a consideration without the accrual of any benefit at all to the promisor. If the promisee has suffered any detriment, however slight, or, though he has suffered no real detriment, if he has done what he was not otherwise bound to do, in return for the promise, he has given a consideration; and the court will not ask whether the promisor was benefited.[88] Where, for instance, the owner of boilers gave another permission to weigh them on the latter's promise to return them in good condition, the permission and advantage taken of it was held a sufficient consideration for the promise. "The defendant," said the court, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave." [89]

So where the defendant had made the promise sued upon in consideration of the plaintiffs' surrender of a guaranty which had been given by the defendant, but which turned out to have been unenforceable because it was within the statute of frauds, the surrender was held a sufficient consideration for the promise. "Whether or

[86] Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326. And see Appeal of Ferguson, 117 Pa. 426, 11 Atl. 885. *See "Contracts," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 231, 232.*

[87] Smith v. Algar, 1 Barn. & Adol. 603. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–298, 316–324.*

[88] Traver v. ———, 1 Sid. 57; Chick v. Trevett, 20 Me. 462, 37 Am. Dec. 68; Fisher v. Bartlett, 8 Greenl. (Me.) 122, 22 Am. Dec. 225; Hind v. Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107; Glasgow v. Hobbs, 32 Ind. 440; Cates v. Bales, 78 Ind. 285; DOYLE v. DIXON, 97 Mass. 208, 93 Am. Dec. 80, Throckmorton Cas. Contracts, 72; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Hall Mfg. Co. v. Supply Co., 48 Mich. 331, 12 N. W. 205. *See "Contracts," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 223, 224.*

[89] Bainbridge v. Firmstone, 8 Adol. & El. 743. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 233–255.*

no the guaranty could have been available," said the court, "the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise." [40]

On this principle, the refraining by a person from the use of liquor and tobacco for a certain time at the request of another has been held a sufficient consideration for a promise by the latter to pay him a sum of money.[41] So also, where a person traveled for his own pleasure and benefit at the request of another, this was held sufficient to support a promise by the latter to reimburse him for his expenses; [42] and, where an executor forbore to act as such on his coexecutor's promise to divide commissions with him, the forbearance was held a consideration for the promise.[43] It has even been held that the liability incurred in purchasing property upon the faith of a promise made by another to contribute a certain sum in part payment of the price is a sufficient consideration to make the promise binding; [44] and where a person agreed to contribute a sum of money for the purpose of discharging a mortgage on church property, on condition that the church would raise the balance by voluntary subscription, and the church performed the condition, it was held that the promise became binding.[45]

[40] Haigh v. Brooks, 10 Adol. & El. 309. And see Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181; Churchill v. Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563; Sykes v. Chadwick, 18 Wall. 141, 21 L. Ed. 824; Merchant v. O'Rourke, 111 Iowa, 351, 82 N. W. 759. Contra: McCollum v. Edmonds, 109 Ala. 322, 19 South. 501, and Grimes v. Grimes, 89 S. W. 548, 28 Ky. Law Rep. 549; the former holding that the surrender of a worthless land certificate, and the latter that the destruction of a worthless note of a third party, does not constitute a valid consideration. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 291–315.*

[41] HAMER v. SIDWAY, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, Throckmorton Cas. Contracts, 100; Talbott v. Stemmons' Ex'r, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531; Lindell v. Rokes, 60 Mo. 249, 21 Am. Rep. 395. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 248.*

[42] Devecmon v. Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422. See, also, Hoshor v. Kautz, 19 Wash. 258, 53 Pac. 51. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 236.*

[43] Ohlendorff v. Kanne, 66 Md. 495, 8 Atl. 351. See, also, John v. John, 122 Pa. 107, 15 Atl. 675. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 233–255, 352; "Executors and Administrators," Dec. Dig. (Key-No.) § 19; Cent. Dig. § 38.*

[44] Steele v. Steele, 75 Md. 477, 23 Atl. 959; Skidmore v. Bradford, L. R. 8 Eq. 134. *See "Contracts," Dec. Dig. (Key-No.) § 66; Cent. Dig. § 241.*

[45] Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500. *See "Subscriptions," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 14–17.*

Marriage is a valuable consideration for a promise,[46] and mutual promises to marry are a consideration each for the other.[47]

We have seen, in discussing contracts under seal, that want of consideration may be shown notwithstanding the seal, where the contract is in partial restraint of trade. The fact, however, that a contract is in partial restraint of trade forms no exception to the doctrine that adequacy of consideration cannot be inquired into.[48]

Exception in Exchange of Fixed Values

The doctrine that courts of law will not inquire into the adequacy of consideration is based on their inability to determine what value the parties may have attached to a thing given or promised, and it does not apply to an exchange of things the value of which is exactly and conclusively fixed by law.[49] In an Indiana case on this point the defendant had promised to pay the plaintiff and others $600 in consideration of a promise by them to pay him one cent, and the consideration was held inadequate. "It is true," said the court, "that, as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money—of coin—whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay $600 for one cent, even had the portion of the cent due from the plaintiff been tendered, is an unconscionable con-

[46] Shadwell v. Shadwell, 9 C. B. (N. S.) 159; Wright v. Wright, 54 N. Y. 437; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Rockafellow v. Newcomb, 57 Ill. 191; Frank's Appeal, 59 Pa. 194; Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; Wright v. Wright, 114 Iowa, 748, 87 N. W. 709, 55 L. R. A. 261. Release from promise to marry is sufficient. Snell v. Bray, 56 Wis. 156, 14 N. W. 14. *See "Contracts," Dec. Dig. (Key-No.) § 54; Cent. Dig. § 239.*

[47] Post, p. 145.

[48] Guerand v. Dandelet, 32 Md. 561, 3 Am. Rep. 164; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; McClurg's Appeal, 58 Pa. 51; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348; Linn v. Sigsbee, 67 Ill. 75; Grasselli v. Lowden, 11 Ohio St. 349; Lawrence v. Kidder, 10 Barb. (N. Y.) 641. *See "Contracts," Dec. Dig. (Key-No.) §§ 53, 116; Cent. Dig. §§ 231, 542.*

[49] Langd. Cont. 70; SCHNELL v. NELL, 17 Ind. 29, 79 Am. Dec. 453, Throckmorton Cas. Contracts, 103; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; Brooks v. Ball, 18 Johns. (N. Y.) 337. *See "Contracts," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 231, 232.*

tract, void at first blush upon its face, if it be regarded as an earnest one." [50]

In Equity

Inadequacy of consideration will be taken into account to some extent by courts of equity in the exercise of their peculiar power to compel specific performance of contracts. It has been held that inadequacy of consideration, without more, is ground upon which specific performance may be resisted; but the better doctrine requires that there shall be such gross inadequacy as to shock the conscience, and amount in itself to evidence of fraud.[51] And if a contract is sought to be avoided on the ground of fraud or undue influence, the consideration may be inquired into, and inadequacy of consideration will be regarded as corroborative evidence in support of the suit;[52] but mere inadequacy of consideration alone is not enough to warrant the court's interference.[53]

SUFFICIENCY OR REALITY OF CONSIDERATION

67. Though the consideration need not be adequate to the promise, it must not be illusory or unreal; some benefit must be conferred on the promisor, or some detriment suffered by the promisee.

Reality of Consideration

Although courts of law will not inquire into the adequacy of consideration, they will insist that it shall not be illusory or unreal.

[50] SCHNELL v. NELL, 17 Ind. 29, 79 Am. Dec. 453, Throckmorton Cas. Contracts, 103. *See "Contracts," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 231, 232.*

[51] Coles v. Trecothick, 9 Ves. 234; Conrad v. Schwamb, 53 Wis. 378, 10 N. W. 395; Conaway v. Sweeney, 24 W. Va. 643; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; Watson v. Doyle, 130 Ill. 415, 22 N. E. 613; Eaton, Eq. 539. In some states an adequate consideration is required by statute. Morrill v. Everson, 77 Cal. 114, 19 Pac. 190. *See "Specific Performance," Dec. Dig. (Key-No.) §§ 49, 50; Cent. Dig. §§ 140–152.*

[52] Gifford v. Thorn, 9 N. J. Eq. 702; Grindrod v. Wolf, 38 Kan. 202, 16 Pac. 691; Bowman v. Patrick (C. C.) 36 Fed. 138; Cofer v. Moore, 87 Ala. 705, 6 South. 306; Burke v. Taylor, 94 Ala. 530, 10 South. 129. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Evidence," Dec. Dig. (Key-No.) § 419; Cent. Dig. §§ 1912–1928.*

[53] Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Jones v. Degge, 84 Va. 685, 5 S. E. 799; Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Berry v. Hall, 105 N. C. 154, 10 S. E. 903; Brockway v. Harrington, 82 Iowa, 23, 47 N. W. 1013; Miles v. Iron Co., 125 N. Y. 294, 26 N. E. 261; Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804; Eaton, Eq. 307. And see the cases cited in the preceding note. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

Strictly speaking, what we call an "unreal consideration" is no consideration at all, but this use of the term cannot well mislead. To understand what the law regards as a real and what as an unreal consideration, it will be well to inquire into the various forms which consideration may assume, and to note the grounds upon which certain alleged considerations have been held to be of no real value in the eye of the law.

Forms of Consideration

The consideration for a promise may be an act or a forbearance, or a promise to do or forbear. When a promise is given for a promise, the contract is said to be made upon an executory consideration. The obligations created by it rest equally upon both parties, each being bound to a future act. An example is in case of mutual promises to marry, in which the consideration for the promise of each is the promise of the other. When the consideration for a promise is an act or forbearance, the contract is said to be made upon a consideration executed. This arises when either the offer or acceptance is signified by one of the parties doing all that he is bound to do under the contract so created.[54]

A contract consisting of mutual promises, so that both parties are bound to some future act or forbearance, is said to be bilateral. A contract in which the offer or acceptance is signified by one of the parties doing all he is required to do under the agreement, leaving outstanding obligations on the other party only, is said to be unilateral.

SAME—MUTUAL PROMISES—MUTUALITY

68. A promise is a sufficient consideration for a promise.

69. The promises must be concurrent.

70. The promise may be contingent or conditional, except that—

MUTUALITY—Mutuality of engagement is necessary, and, if the condition or contingency produces want of mutuality, the consideration is insufficient. Both parties must be bound or neither is bound.

It is well settled that a promise is a sufficient consideration for a promise.[55] And this is true although the performance of the act

[54] Thomas v. South Haven & E. R. Co., 138 Mich. 50, 100 N. W. 1009. *See "Contracts," Dec. Dig. (Key-No.) § 78; Cent. Dig. §§ 354–356.*

[55] Higgins v. Hill, 56 Law T. R. (N. S.) 426; Strangborough and Warner's Case, 4 Leon, 3; Gower v. Capper, Cro. Eliz. 543; Nichols v. Raynbred, Hob.

promised will result in greater benefit to the promisor than to the promisee.[56] In the case of mutual promises to marry, the promise of each party is a sufficient consideration for the promise of the other;[57] and so it is in any other case of mutual promises, provided, of course, the promises are to do something of value in the eye of the law. In other words, as a rule, a promise to do a thing is just as valuable a consideration as the actual doing of it would be. After a person had sold and conveyed land, the parties, differing as to the quantity of land embraced in the tract, made an agreement by which the land was to be surveyed, and the grantor should pay for any deficiency, while the grantee should pay for any excess over the acreage mentioned in the deed. It turned out that there was an excess, but the grantee, when sued on his promise to pay therefor, claimed that, as all the land was conveyed by the deed, his promise was without consideration. It was held, however, that the promise of the grantor to pay for any deficiency was a sufficient consideration.[58]

The promises, to constitute a consideration for each other, must be concurrent, or become obligatory at the same time; otherwise each will be without consideration at the time it is made, and both will therefore be nuda pacta.[59] As explained in treating of offer and acceptance, some time must necessarily elapse between an offer and its acceptance, and in some cases a considerable time may elapse. The offer, however, is considered as continuing during the time allowed for acceptance; and when it is accepted by the giving of a promise both promises become obligatory at the same time, or are concurrent.

88; Missisquoi Bank v. Sabin, 48 Vt. 239; Buckingham v. Ludlum, 40 N. J. Eq. 422, 2 Atl. 265; Phillips v. Preston, 5 How. 278, 12 L. Ed. 152; Funk v. Hough, 29 Ill. 145; Coleman v. Eyre, 45 N. Y. 38; Briggs v. Tillotson, 8 Johns. (N. Y.) 304; Baker v. Railroad Co., 91 Mo. 152, 3 S. W. 486; Porter v. Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; Cramer v. Redman, 10 Wyo. 328, 68 Pac. 1003. Promise to attend a person's funeral in return for promise by the latter to pay money. Earle v. Angell, 157 Mass. 294, 32 N. E. 164. *See "Contracts," Dec. Dig. (Key-No.) § 56; Cent. Dig. §§ 344–353.*

[56] Dendy v. Russell, 74 Pac. 248, 67 Kan. 721. *See "Contracts," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 344, 345.*

[57] Harrison v. Cage, 5 Mod. 411; Holt v. Ward Clemencieux, 2 Strange, 937. *See "Breach of Marriage Promise," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 2.*

[58] Seward v. Mitchell, 1 Cold. (Tenn.) 87; Howe v. O'Mally, 5 N. C. 287, 3 Am. Dec. 693. It would be otherwise if there were no promise by the grantor. Smith v. Ware, 13 Johns. (N. Y.) 259. *See "Contracts," Dec. Dig. (Key-No.) §§ 56–58; Cent. Dig. §§ 344–353.*

[59] Nichols v. Raynbred, Hob. 88; Keep v. Goodrich, 12 Johns. (N. Y.) 397: Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Buckingham v. Lud-

A promise which is merely voidable, as in case of an infant, may be a sufficient consideration.[60] And, as we have seen, an oral promise which is unenforceable within the statute of frauds is generally held to be a good consideration for the promise of the other if he has signed the writing.[61]

Voluntary Subscriptions

Voluntary subscriptions by a number of persons to promote some object in which they have a common interest—as, for instance, where a number of persons voluntarily promise to pay a certain sum each to found a college—have been said to furnish an illustration of mutual promises. Some courts have sustained them on the ground that the promise of each subscriber is the consideration for the promises of the others.[62] This ground, however, appears to be untenable, for the reason that as a matter of fact the subscribers, in most cases at least, do not give their promises in consideration of each other.[63] An additional objection to a recovery by the beneficiary in such cases is that the beneficiary, not being a party to the contract, cannot maintain an action upon it,[64] except in states which have established the broad rule that a person for whose benefit a promise is made can sue upon it.[65] The liability of the subscriber upon his subscription in such cases is generally enforced, but different courts advance different views in support of their holdings.[66] By some courts it is held that the subscription is an offer which becomes binding by acceptance when the beneficiary

lum, 40 N. J. Eq. 422, 2 Atl. 265. *See "Contracts," Dec. Dig. (Key-No.) §§ 56–58; Cent. Dig. §§ 344–353.*

[60] Holt v. Ward Clemencieux, 2 Strange, 937; post, p. 185. *See "Contracts," Dec. Dig. (Key-No.) §§ 56–58; Cent. Dig. §§ 344–353.*

[61] Ante, pp. 110, 131.

[62] Higert v. Asbury University, 53 Ind. 326 (collecting cases); Lathrop v. Knapp, 27 Wis. 214; Trustees of Troy Conference Academy v. Nelson, 24 Vt. 189; Christian College v. Hendley, 49 Cal. 347; Allen v. Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; First Universalist Church v. Pungs, 126 Mich. 670, 86 N. W. 235; Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727; Waters v. Union Trust Co., 129 Mich. 640, 89 N. W. 687. *See "Subscriptions," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 14–17.*

[63] Cottage Street Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Culver v. Banning, 19 Minn. 303 (Gil. 260); Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767. *See "Subscriptions," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 14–17.*

[64] Presbyterian Church of Albany v. Cooper, supra. Cf. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325. See post, p. 442. *See "Subscriptions," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 14–17.*

[65] Irwin v. Lombard University, supra.

[66] See 15 Harv. L. R. 312.

in reliance upon it incurs expense or liability.[67] Other courts sustain the liability of the subscriber on the ground of equitable estoppel arising from the expenditure of money or incurring of liability by the beneficiary in reliance upon the subscription.[68] By still other courts it is held that when the subscription is accepted there is an implied counter promise on the part of the beneficiary, which is the consideration.[69] In accordance with this latter view, it is said in a recent Pennsylvania case:[70] "The general trend of judicial decision may therefore be said to be in the direction of sustaining contracts for subscriptions or donations to churches or charitable or kindred institutions, where the same have been duly accepted; their acceptance constituting a good consideration, for the reason that obligations are thereby assumed."

Contingent and Conditional Promises—Options

In bilateral contracts—that is, where the consideration for a promise is a promise—the whole contract may be intended by the parties to be contingent, so that obligation is to arise under it only upon the occurrence of some event or contingency. If A. offers to supply at a certain price such goods as B. may order, and B. promises to pay at that price for such goods as he may order, there is, of course, no contract, for B. has not promised to order any goods, and it is optional with him whether his promise to pay shall ever come into effect.[71] Both parties must be bound or neither

[67] Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197; Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158, 11 Pac. 592. See, also, Twenty-Third St. Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 117, 6 L. R. A. 807; Town of Grand Isle v. Kinney, 70 Vt. 361, 41 Atl. 130; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726. *See "Subscriptions," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 14–17.*

[68] BEATTY'S ESTATE v. WESTERN COLLEGE OF TOLEDO, IOWA, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242, Throckmorton Cas. Contracts, 106. See, also, Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727; Simpson Centenary College v. Tuttle, 71 Iowa, 596, 33 N. W. 74. *See "Subscriptions," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 14–17.*

[69] Trustees of Maine Cent. Inst. v. Haskell, 73 Me. 140; Barnett v. Franklin College, 10 Ind. App. 103, 37 N. E. 427. And see Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325. *See "Subscriptions," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 6, 7.*

[70] Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689, per Thompson, J. *See "Subscriptions," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 6, 7.*

[71] American Cotton Oil Co. v. Kirk, 68 Fed. 791, 15 C. C. A. 540; Rafolovits v. Tobacco Co., 73 Hun, 87, 25 N. Y. Supp. 1036; Chicago & G. E. Ry. Co. v. Dane, 43 N. Y. 240; Davie v. Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982; Dennis v. Slyfield, 117

is bound; in other words, there must be mutuality of engagement.[72] In such a case, indeed, if before the offer is withdrawn, B orders goods, A. is bound to sell at the price named.[73]

On the other hand, if A. offers to supply at a certain price all the goods of a certain kind which B. may need in his business for a certain time, and B. promises to buy such goods, the promises are mutually binding;[74] for although B. may not need the goods, and hence is not absolutely bound to pay, in the event of the contingency of his needing the goods he is bound to buy them of A. So, if the agreement is for the purchase by B. of all or a certain part of

Fed. 474, 54 C. C. A. 520. *See "Contracts," Dec. Dig. (Key-No.) §§ 58, 59; Cent. Dig. §§ 346–348; "Sales," Dec. Dig. (Key-No.) §§ 24, 25; Cent. Dig. §§ 49–52; "Vendor and Purchaser," Dec. Dig. (Key-No.) § 18; Cent. Dig. § 23.*

[72] Keep v. Goodrich, 12 Johns. (N. Y.) 397; Ewins v. Gordon, 49 N. H. 444; Burnet v. Bisco, 4 Johns. (N. Y.) 235; McKinley v. Watkins, 13 Ill. 140; L'Amoreux v. Gould, 7 N. Y. 349, 57 Am. Dec. 524; Thayer v. Burchard, 99 Mass. 508; Smith v. Weaver, 90 Ill. 392; Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Mers v. Insurance Co., 68 Mo. 127; Stembridge v. Stembridge's Adm'r, 87 Ky. 91, 7 S. W. 611; Shenandoah Val. R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239; Barker v. Critzer, 35 Kan. 459, 11 Pac. 382; Warren v. Costello, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; Greybill v. Brugh, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894; Wagner v. J. & G. Meakin, 92 Fed. 76, 33 C. C. A. 577; Morrow v. Express Co., 101 Ga. 810, 28 S. E. 998. See, also, cases cited, p. 146, note 59. *See "Sales," Dec. Dig. (Key-No.) §§ 24, 25; Cent. Dig. §§ 49–52.*

[73] G. N. Railway Co. v. Witham, L. R. 9 C. P. 16; Johnston v. Trippe (C. C.) 33 Fed. 530; Moses v. McClain, 82 Ala. 370, 2 South. 741; Wisconsin, I. & N. Ry. Co. v. Braham, 71 Iowa, 484, 32 N. W. 392; Davis v. Robert, 89 Ala. 402, 8 South. 114, 18 Am. St. Rep. 126; Ross v. Parks, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; Thayer v. Burchard, 99 Mass. 508; Cooper v. Wheel Co., 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341. See, also, Michigan Bolt & Nut Works v. Steel, 111 Mich. 153, 69 N. W. 241. Filing of bill by vendee for specific performance has been held to supply mutuality. Dynan v. McCulloch, 46 N. J. Eq. 11, 18 Atl. 822. But most of the cases are to the contrary. See cases cited ante, note 72. *See "Sales," Dec. Dig. (Key-No.) §§ 24, 25; Cent. Dig. §§ 49–52.*

[74] See Sheffield Furnace Co. v. Coke Co., 101 Ala. 446, 14 South. 672; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Smith v. Morse, 20 La. Ann. 220; Minnesota Lumber Co. v. Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; E. G. Dailey Co. v. Can Co., 128 Mich. 591, 87 N. W. 761; Manhattan Oil Co. v. Lubricating Co., 113 Fed. 923, 51 C. C. A. 553; Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459; Loudenback Fertilizer Co. v. Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402. Contra, Bailey v. Austrian, 19 Minn. 535 (Gil. 465). An agreement by a wholesale dealer to supply a retailer, which leaves it practically optional to increase or diminish his orders with the rise or fall of prices, held void for want of mutuality. Crane v. C. Crane & Co., 105 Fed. 869, 45 C. C. A. 96. See, also, Cold Blast Transp. Co. v. Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. *See "Sales," Dec. Dig. (Key-No.) §§ 24, 25; Cent. Dig. §§ 49–52.*

all the goods of a certain kind that A. may produce in a certain period.[75]

Somewhat similar in character are the considerations which consist in conditional promises;[76] as, for instance, where a person promises to do something for a reward, but the other party only binds himself to pay the reward upon the happening of an event which may not be under the control of either party. Such would be the case in a building contract where the promise to pay for the work to be done is made conditional upon the approval of the architect. Again, the promise may be conditional on something happening, as in case of promises in a charter party which are not to take effect if certain specified risks occur. In the one case the promise depends for its fulfillment upon a condition precedent; in the other it is liable to be defeated by a condition subsequent. In neither case does its conditional character prevent it from forming a sufficient consideration for promises given in return. These cases are for consideration in a subsequent chapter.[77]

SAME—FORBEARANCE TO EXERCISE A RIGHT

71. Forbearance or a promise to forbear from doing what one is otherwise entitled to do is a sufficient consideration.

72. Forbearance or a promise to forbear from doing what one cannot legally do is no consideration; but if a right is doubtful, so that there are reasonable grounds for trying to enforce it, forbearance is a sufficient consideration.

73. COMPROMISE. Where the forbearance is in the compromise of a disputed claim made or action brought in good faith (and on reasonable grounds),[78] forbearance to insist or sue

[75] McCall Co. v. Icks, 107 Wis. 232, 83 N. W. 300. See, also, Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367; Brawley v. U. S., 96 U. S. 168, 24 L. Ed. 622; Lobenstein v. U. S., 91 U. S. 324, 23 L. Ed. 410; Grant v. U. S., 7 Wall. 331, 19 L. Ed. 194. Where land was agreed to be sold, and the title was defective, by reason of a suit to set aside a will under which the vendor claimed, an agreement to postpone execution of the contract until determination of the suit was sustained on the ground that the vendee would be bound to accept the title if the will should be sustained. Hale v. Cravener, 128 Ill. 408, 21 N. E. 534. See ante, p. 149, note 74. *See "Sales," Dec. Dig. (Key-No.) §§ 24, 25; Cent. Dig. §§ 49–52.*

[76] Ensign v. Park, 69 Kan. 870, 77 Pac. 583. *See "Contracts," Dec. Dig (Key-No.) §§ 58, 59; Cent. Dig. §§ 346–348.*

[77] Chapter 11, pp. 576–578.

[78] As to the qualification introduced by the words in parentheses, see post, p. 155.

on the claim, or further to prosecute the action, is a sufficient consideration without regard to the validity of the claim.

Consideration may consist in a forbearance or promise to forbear from doing what one is otherwise entitled to do; as, for instance, where a person abstains from the use of liquor and tobacco, on another's promise to pay him money.[79] The abandonment of any right, or a promise to forbear from exercising it, is a sufficient consideration for a promise.[80] The right may be legal or equitable, certain or doubtful; and it may exist against the promisor or against a third party.[81] A creditor, if he extends the time for payment of the debt, gives up a right, and so furnishes a consideration for an additional promise by the debtor,[82] or for the promise of a third party to guaranty or pay the debt.[83] So, also, the discharge of a debtor from the debt,[84] or from lawful imprisonment for the

[79] Ante, pp. 133, 134.

[80] Blake v. Peck, 11 Vt. 483; Leverenz v. Haines, 32 Ill. 357; Woodburn v. Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593; Marshalltown Stone Co. v. Manufacturing Co., 114 Iowa, 574, 87 N. W. 496; Waters v. White, 75 Conn. 88, 52 Atl. 401. Agreement between attachment creditors of a debtor. Mygatt v. Tarbell, 78 Wis. 351, 47 N. W. 618; Doan v. Dow, 6 Ind. App. 324, 35 N. E. 709; Brownell v. Harsh, 29 Ohio St. 631. Forbearance to contest will. Rector, etc., of St. Mark's Church, v. Teed, 120 N. Y. 583, 24 N. E. 1014. The release by a person of a claim, in good faith, of a future contingent interest in certain land under the will of a deceased ancestor, is a sufficient consideration for a note given therefor, whether he in fact had any interest in the land or not. Brooks v. Wage, 85 Wis. 12, 54 N. W. 997. Release of mortgage. Norris v. Vosburgh, 98 Mich. 426, 57 N. W. 264. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[81] Release by wife of inchoate right of dower will support a promise by her husband's grantee to pay her money. Worley v. Sipe, 111 Ind. 238, 12 N. E. 385. Release of inchoate right of homestead in public lands will support a promise. McCabe v. Caner, 68 Mich. 182, 35 N. W. 901. And see Paxton Cattle Co. v. Bank, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[82] Lipsmeier v. Vehslage (C. C.) 29 Fed. 175; Martin v. Nixon, 92 Mo. 26, 4 S. W. 503; Van Gorder v. Bank (Pa.) 7 Atl. 144; Brown v. Bank, 115 Ind. 572, 18 N. E. 56; Lundberg v. Elevator Co., 42 Minn. 37, 43 N. W. 685; Sanders v. Smith (Miss.) 5 South. 514; Fraser v. Backus, 62 Mich. 540, 29 N. W. 92; Lodge v. Hulings, 63 N. J. Eq. 159, 51 Atl. 1015. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[83] Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593; Bank of New Hanover v. Bridgers, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317; Meyers v. Hockenbury, 34 N. J. Law, 346. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[84] Whitney v. Clary, 145 Mass. 156, 13 N. E. 393; Fulton v. Loughlin, 118

debt,[85] is a consideration for the promise of a third person to pay the debt; and the surrender or cancellation of a note or mortgage is a consideration for a new note or mortgage.[86]

It has been held that agreement to forbear is necessary, and that mere forbearance to sue, for instance, without any agreement to that effect, is not a sufficient consideration for the promise of another to pay the debt of the person liable, though the act of forbearance may have been induced by the promise;[87] but upon principle it seems that actual forbearance upon request and in reliance upon the promise is sufficient.[88]

Time of Forbearance

Questions have been raised as to the length of time over which a forbearance to sue must extend in order to constitute a consideration. It has even been held that a promise of forbearance for an unspecified time was insufficient,[89] but it is now settled that a promise of forbearance need not be a promise of absolute forbearance, nor even of forbearance for a definite time. Where no time is mentioned, a reasonable time will be implied, or, at any rate, where there is a promise to forbear, and actual forbearance for a reasonable time, it is enough.[90]

Ind. 286, 20 N. E. 796. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[85] Smith v. Monteith, 13 Mees. & W. 427. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[86] Constant v. University, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769; Erie Co. Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[87] Manter v. Churchill, 127 Mass. 31. And see Mecorney v. Stanley, 8 Cush. (Mass.) 85; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403. *See "Contracts," Dec. Dig. (Key-No.) § 73; Cent. Dig. §§ 326, 327.*

[88] Crears v. Hunter, 19 Q. B. Div. 341. And see Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330; Waters v. White, 75 Conn. 88, 52 Atl. 401; Standard Supply Co. v. Person, 70 S. E. 745, 154 N. C. 456 (where this doctrine is said to be supported by the weight of authority). *See "Contracts," Dec. Dig. (Key-No.) § 73; Cent. Dig. §§ 326, 327.*

[89] Semple v. Pink, 1 Exch. 74. See Payne v. Wilson, 7 Barn. & C. 423. *See "Contracts," Dec. Dig. (Key-No.) § 71; Cent. Dig. §§ 295–324.*

[90] Oldershaw v. King, 2 Hurl. & N. 399, 517; Alliance Bank v. Broom, 2 Drew. & S. 289; Howe v. Taggart, 133 Mass. 284; Elting v. Vanderlyn, 4 Johns. (N. Y.) 237; Bowen v. Tipton, 64 Md. 275, 1 Atl. 861; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593; Moore v. McKenney, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753; Foard v. Grinter's Ex'rs (Ky.) 18 S. W. 1034; Traders' Nat. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094; Citizens' Sav. Bank & Trust Co. v. Babbitts' Estate, 71 Vt. 182, 44 Atl. 71; McMicken v. Safford, 197 Ill. 540, 64 N. E. 540. But see Garnett v. Kirkman, 33 Miss. 389; Clark v. Russel, 3 Watts (Pa.) 213, 27 Am. Dec. 348. *See "Contracts," Dec. Dig. (Key-No.) §§ 212, 213; Cent. Dig. §§ 950, 962.*

Forbearance to Do What One Cannot Legally Do

It is no consideration for a promise for a man to forbear or to promise to forbear from doing what he is not legally entitled to do.[91] This proposition would seem to be obvious, but questions have arisen in its application, and have given rise to some conflict in the decisions.

Some applications of the principle are clear. A forbearance or promise to forbear, for instance, from claims under an illegal contract, such as a gambling contract, or a contract involving the commission of crime, can form no consideration for the promise of the other party, since the contract is void, and could not be enforced.[92] So, also, the release of a debtor from imprisonment was held to be no consideration for a promise where, by the previous release of a codebtor, the debt had been discharged, since the imprisonment was therefore unlawful.[93] So a promise to pay rent, made solely to prevent an unlawful eviction, is without consideration.[94]

As a general rule, it is safe to say that, in order that forbearance to exercise a right may constitute a consideration, the right must be at least doubtful. Forbearance to insist upon a claim that is clearly unenforceable, at least if it be known to the claimant to be such, cannot be a consideration.

Compromise

A common form in which a forbearance appears as the consideration for a promise is in the settlement or compromise of a disputed

[91] In Barnard v. Simons (1616) 1 Rolle, Abr. 26, Langd. Cas. Cont. 194, it was said that "if A. makes a void assumpsit to B., and afterwards a stranger comes to B., and, in consideration that B. will relinquish the assumpsit made to him by A., he promises to pay him £10, this is not a good consideration to charge him, because the first assumpsit was void." See Palfrey v. Railroad Co., 4 Allen (Mass.) 55; Shuder v. Newby, 85 Tenn. 348, 3 S. W. 438; Clark v. Jones, 85 Ala. 127, 4 South. 771; Sharpe v. Rogers, 12 Minn. 174 (Gil. 103); Harris v. Cassady, 107 Ind. 158, 8 N. E. 29; Ecker v. McAllister, 54 Md. 369; Schroeder v. Fink, 60 Md. 438; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Martin v. Black, 20 Ala. 309; Prater v. Miller, 25 Ala. 320, 60 Am. Dec. 521; Davisson v. Ford, 23 W. Va. 617; Eblin v. Miller's Ex'rs, 78 Ky. 371. Many of these cases, however, in conflict with what is the prevailing rule, maintain that forbearance to sue on an invalid claim, though honestly believed in, is no consideration. Post, p. 155. *See "Contracts," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 325.*

[92] Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269. *See "Contracts," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 325.*

[93] Herring v. Dorell, 8 Dowl. Pr. Cas. 604. *See "Contracts," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 325.*

[94] Smith v. Coker, 110 Ga. 654, 36 S. E. 107; Tolhurst v. Powers, 133 N. Y. 460, 31 N. E. 326 (surrender of what promisee has no right to retain). *See "Contracts," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 325.*

claim. Forbearance by a person to insist upon a demand, or to prosecute an action which he has commenced, is, subject to exceptions to be presently explained, a sufficient consideration.[95] Illustrations are furnished by cases in which one party makes a claim or demand on another, and the latter disputes it, whereupon they settle the dispute by a compromise, or by agreeing upon the amount due in an account stated. Likewise a compromise will support a promise by a third party.[96]

The authorities are all agreed that the promisee must believe in his claim, or in his action; and that forbearance to sue on a demand known by him to be unenforceable, or to proceed in an action knowingly brought without cause, is no consideration.[97] It is also well settled that the mere fact that the claim was invalid or unenforceable does not prevent its surrender from constituting a good consideration if the claim was a doubtful one in regard to the validity of which there was reasonable ground for difference of opinion.[98] When we reach this point, the difficulty begins.[99]

[95] SMITH v. FARRA, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115, Throckmorton Cas. Contracts, 109; McKinley v. Watkins, 13 Ill. 140; Cook v. Wright, 1 Best & S. 559; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; McClellan v. Kennedy, 8 Md. 247; Longridge v. Dorville, 5 Barn. & A. 117; Jones v. Rittenhouse, 87 Ind. 348; Fisher v. May's Heirs, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; Hennessy v. Bacon, 137 U. S. 85, 11 Sup. Ct. 17, 34 L. Ed. 605; Sisson v. City of Baltimore, 51 Md. 83; Crowther v. Farrer, 15 Q. B. 677; Nash v. Armstrong, 10 C. B. (N. S.) 259; Heffelfinger v. Hummel, 90 Iowa, 311, 57 N. W. 872; McClure v. McClure, 100 Cal. 339, 34 Pac. 822. The suit need not be actually discontinued before suit on the promise. The agreement ends it. Phillips v. Pullen, 50 N. J. Law, 439, 14 Atl. 222; Van Campen v. Ford, 53 Hun, 636, 6 N. Y. Supp. 139; Rappanier v. Bannon (Md.) 8 Atl. 555. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 35–50; "Contracts," Cent. Dig. § 329.*

[96] Bane's Case (1611) 9 Coke, 93b. Withdrawal of a suit against a person, for instance, will support his father's note. Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 35–50; "Contracts," Cent. Dig. § 329.*

[97] Wade v. Simeon, 2 C. B. 548; McKinley v. Watkins, 13 Ill. 140; Rood v. Jones, 1 Doug. (Mich.) 188; McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Phillips v. Pullen, 50 N. J. Law, 439, 14 Atl. 222; Von Brandenstein v. Ebensberger, 71 Tex. 267, 9 S. W. 153; Demars v. Manufacturing Co., 37 Minn. 418, 35 N. W. 1; Taylor v. Weeks, 129 Mich. 233, 88 N. W. 466. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 35–50; "Contracts," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 328–330.*

[98] SMITH v. FARRA, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115, Throckmorton Cas. Contracts, 109; Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76; Korne v. Korne, 30 W. Va. 1, 3 S. E. 17; Neibles v. Railway Co., 37 Minn. 151, 33 N. W. 332; Honeyman v. Jarvis, 79 Ill. 318; Potts v. Polk Co., 80 Iowa, 401, 45

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[99] See cases cited infra, notes 1–5.

In some jurisdictions, the compromise is said to be void for want of consideration unless there was actual doubt as to the validity of the promisee's claim.[1] According to these authorities, belief by the promisee in the existence of a good claim is not sufficient, if in fact there was no reasonable ground for his belief.

In England,[2] however, and by the weight of authority in this country,[3] the compromise is upon sufficient consideration if the promisee surrenders a claim made by him in good faith, even though the claim was unenforceable and there was no reasonable ground for his belief in its validity. In a leading English case it was said: "If he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. * * * It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise derived an advantage under it; in that case his conduct would be fraudulent." [4] And in a later

N. W. 775; Prout v. Pittsfield Fire Dist., 154 Mass. 450, 28 N. E. 679; Dovale v. Ackermann, 2 App. Div. 404, 37 N. Y. Supp. 959. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 35–50; "Contracts," Cent. Dig. § 329.*

[1] Mulholland v. Bartlett, 74 Ill. 58; Bates v. Sandy, 27 Ill. App. 552; United States Mortgage Co. v. Henderson, 111 Ind. 24, 12 N. E. 88; Russell v. Wright, 98 Ala. 652, 13 South. 594; Fink v. Smith, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750; Palfrey v. Railroad Co., 4 Allen (Mass.) 55; Schroeder v. Fink, 60 Md. 436; Emmittsburg R. Co. v. Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Davisson v. Ford, 23 W. Va. 613; Cline v. Templeton, 78 Ky. 550; Gunning v. Royal, 59 Miss. 45, 42 Am. Rep. 350; Price v. Bank, 62 Kan. 743, 64 Pac. 639. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 35–50; "Contracts," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 328–330.*

[2] See cases cited infra, notes 4, 5.

[3] SMITH v. FARRA, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115, Throckmorton Cas. Contracts, 109; Crans v. Hunter, 28 N. Y. 389; Zoebisch v. Von Minden, 120 N. Y. 406, 24 N. E. 795; Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369; Bellows v. Sowles, 55 Vt. 391, 45 Am. Rep. 621; Hewett v. Currier, 63 Wis. 386, 23 N. W. 884; Appeal of Gormley, 130 Pa. 467, 18 Atl. 727; Hansen v. Gaar, Scott & Co., 63 Minn. 94, 65 N. W. 254; Di Iorio v. Di Brasio, 21 R. I. 208, 42 Atl. 1114; Hanchett v. Ives, 171 Ill. 122, 49 N. E. 206; Rowe v. Barnes, 101 Iowa, 302, 70 N. W. 197; GALUSHA v. SHERMAN, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, Throckmorton, Cas. Contracts, 200. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 35–50; "Contracts," Cent. Dig. § 329.*

[4] Callisher v. Bischoffsheim, L. R. 5 Q. B. 449. See, also, Cook v. Wright, 1 B. & S. 559. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 6;*

case it was said: "If there is in fact a serious claim honestly made, the abandonment of the claim is a good consideration. * * * Now, by 'honest claim,' I think is meant this: that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one." [5] These cases thus allow the whole question to depend on the good faith of the party forbearing, without any regard whatever to the validity of his claim.

Admitting that forbearance from what one is not legally entitled to do is no consideration, it may be said that one has a right to assert or litigate a claim in which he believes, and that forbearance from this right is a consideration.

SAME—DOING WHAT ONE IS BOUND TO DO

74. IN GENERAL. Doing or promising what one is already legally bound to do is, as a rule, no consideration. Such previous obligation may arise

(a) By virtue of a prior contract, or

(b) By law, independently of contract.

75. ADDITIONAL COMPENSATION. In some jurisdictions, a promise to perform, or performance of, an existing contract, is held to be consideration for a promise by the other party to pay additional compensation; and in some jurisdictions such promise to perform or performance is held to be consideration for a promise by a third person to pay additional compensation.

76. PART PAYMENT IN SATISFACTION OF DEBT. Under the general rule, payment of part of a debt is no consideration for a discharge of the debt.

Another form of unreality of consideration is where the alleged consideration is a promise to do, or actually doing, what a person is already bound to do. The promisor gets no more in return for his promise than the promisee was already bound to give, and therefore receives no consideration.[6] Such prior obligation may

Cent. Dig. §§ *35–50; "Contracts," Dec. Dig.* (*Key-No.*) § *68; Cent. Dig.* §§ *328–330.*

[5] Miles v. New Zealand, etc., Co., 32 Ch. D. 266, per Cotton, L. J. *See "Compromise and Settlement," Dec. Dig.* (*Key-No.*) § *6; Cent. Dig.* §§ *35–50; "Contracts," Dec. Dig.* (*Key-No.*) § *68; Cent. Dig.* §§ *328–330.*

[6] Conover v. Stillwell, 34 N. J. Law, 54; Jennings v. Chase, 10 Allen (Mass.) 526; Warren v. Hodge, 121 Mass. 106; Schuler v. Myton, 48 Kan. 282, 29

arise (1) from a previous contract, or (2) from law, independently of contract.

Where, for instance, a seaman deserted a vessel, and the captain promised the rest of the crew extra pay if they would work the vessel home, the promise was held to be without consideration, because the seamen had, before sailing, agreed to do all they could under all the emergencies of the voyage, and the desertion by some of the seamen was an emergency. Here the seamen promised no more than their contract bound them to do.[7] Where a public officer is required by law to make an arrest, a promise by an individual to pay him for doing so is without consideration;[8] and so it is with a promise to pay a public officer or a witness extra

Pac. 163; Holmes v. Boyd, 90 Ind. 332; Keffer v. Grayson, 76 Va. 517, 44 Am. Rep. 171; Harris v. Cassaday, 107 Ind. 158, 8 N. E. 29; Stuber v. Schack, 83 Ill. 191; Phœnix Ins. Co. v. Rink, 110 Ill. 538; Harriman v. Harriman, 12 Gray (Mass.) 341; Tucker v. Bartle, 85 Mo. 114; Eblin v. Miller's Ex'rs, 78 Ky. 371; Sherwin v. Brigham, 39 Ohio St. 137; Watts v. Frenche, 19 N. J. Eq. 407; Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886; Jenness v. Lane, 26 Me. 475; Wendover v. Baker, 121 Mo. 273, 25 S. W. 918; Arend v. Smith, 151 N. Y. 502, 45 N. E. 872; Allen v. Plasmeyere, 3 Neb. (Unof.) 187, 90 N. W. 1125; Barringer v. Ryder, 119 Iowa, 121, 93 N. W. 56; Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21. On this principle, a promise by a creditor after maturity of the debt, to extend the time of payment, is not binding unless some collateral consideration is received. Hoffman v. Coombs, 9 Gill (Md.) 284; Turnbull v. Brock, 31 Ohio St. 649; Pfeiffer v. Campbell, 111 N. Y. 631, 19 N. E. 498; Holmes v. Boyd, 90 Ind. 332; Ives v. Bosley, 35 Md. 262, 6 Am. Rep. 411; Helms v. Crane, 4 Tex. Civ. App. 89, 23 S. W. 392; Skinner v. Mining Co. (C. C.) 96 Fed. 735. A promise to extend in consideration of a promise to pay the debt with interest at the same rate is without consideration. Kellogg v. Olmsted, 25 N. Y. 189; Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685; Wilson v. Powers, 130 Mass. 127; Holmes v. Boyd, 90 Ind. 332; Price v. Mitchell, 23 Wash. 742, 63 Pac. 514.

It has been held, however, that a promise to extend is supported by a promise to pay interest at the same, or even a less rate, for a certain time, since the debtor foregoes his right to pay before that time. Fawcett v. Freshwater, 31 Ohio St. 637; Fowler v. Brooks, 13 N. H. 240; Simpson v. Evans, 44 Minn. 419, 46 N. W. 908. See, also, Moore v. Redding, 69 Miss. 841, 13 South. 849. *See "Contracts," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 273–285.*

[7] Stilk v. Meyrick, 2 Camp. 317. See, also, Harris v. Carter, 3 El. & Bl. 559; Bartlett v. Wyman, 14 Johns. (N. Y.) 260; Vanderbilt v. Schreyer, 91 N. Y. 392. It would have been different if risks had arisen which were not contemplated by the contract. For instance, such a contract as in the case cited contains an implied warranty that the ship shall be seaworthy. So, where a seaman had signed articles of agreement to navigate a vessel, and the vessel proved unseaworthy, a promise of extra pay to induce him to abide by his contract was held binding. Turner v. Owen, 3 Fost. & F. 177. *See "Contracts," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 273–285.*

[8] Smith v. Whildin, 10 Pa. 39, 49 Am. Dec. 572; Hogan v. Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809. See post, p. 352. *See "Contracts," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 273–285.*

compensation for performing services for which his fees are fixed by law.[9] In these cases the officer or witness does no more than he is required by law to do, and therefore gives no consideration. Of course, it is otherwise with agreements to pay officers for doing something beyond the scope of their official duties.[10] The doctrine also applies to a promise to do or doing what one may be compelled to do in equity.[11] It will be seen from the cases mentioned that the actual performance of that which a man is legally bound to do stands on the same footing as his promise to do what he is legally compellable to do.

The rule above stated would seem to be an obvious result of the doctrine of consideration, but some of its applications have met with severe criticism, and there is much direct conflict in the decisions on the subject.

Mutual Discharge and Substituted Agreement—Additional Compensation

In the case of a contract which is wholly executory,—that is, a contract in which there is something to be done on both sides,—it can, as we shall see in treating of discharge of contract, be discharged by mutual consent. The acquittance of each from the other's claims in such a case is the consideration of each to waive his own.[12] If parties can so discharge the contract, it follows that they may substitute a new contract in its place. Suppose, however, that one of the parties to a contract refuses to perform, because he finds that he must suffer a loss by performance; and suppose the other party wishes performance, and requires it to prevent serious loss. Would a promise, made by him in order to induce the other to perform, of more than he was liable to pay or do under the original contract, be binding, or would it be void, on the ground that the only consideration for it is the promise by the other to perform the original contract,—a thing which he was already bound to do? The courts differ in their answers to this question.[13]

[9] See Lucas v. Allen, 80 Ky. 681; Hatch v. Mann, 15 Wend. (N. Y.) 45. Since a witness, however, cannot be compelled to attend in another state, a party's promise of extra compensation to induce him to attend is binding. Armstrong v. Prentice, 86 Wis. 210, 56 N. W. 742. *See "Contracts," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 273–285.*

[10] England v. Davidson, 11 Adol. & E. 856; McCandless v. Steel Co., 152 Pa. 139, 25 Atl. 579; Studley v. Ballard, 169 Mass. 295, 47 N. E. 1000, 61 Am. St. Rep. 286. *See "Contracts," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 273–285.*

[11] Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224. *See "Contracts," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 273–285.*

[12] Post, p. 526.

[13] See infra, notes 14–17.

Some courts hold, in accordance with the general rule, that the promise of extra compensation is without consideration and void.[14] In some of these jurisdictions, however, an exception has been recognized where the new promise is made on account of unforeseen and substantial difficulties in the performance of the contract.[15] In the language of the leading case recognizing the exception,[16] "where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay for benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them."

Other courts hold outright that, even where there is nothing more than refusal on the part of one party to perform, a new agreement, in which the other, to induce him not to break, but to go on with, his contract, promises to pay him a larger sum than originally promised, at least if it is in substitution of the original contract, is binding.[17] Some of these courts base their decision

[14] KING v. RAILWAY CO., 61 Minn. 482, 63 N. W. 1105, Throckmorton Cas. Contracts, 115; Vanderbilt v. Schreyer, 91 N. Y. 392; Reynolds v. Nugent, 25 Ind. 328; Erb v. Brown, 69 Pa. 216; Ayres v. Railway Co., 52 Iowa, 478, 3 N. W. 522; McCarthy v. Association, 61 Iowa, 287, 16 N. W. 114; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Keith v. Miles, 39 Miss. 442, 77 Am. Dec. 685; Gaar, Scott & Co. v. Green, 6 N. D. 48, 68 N. W. 318; Jones v. Risley, 91 Tex. 1, 32 S. W. 1027; Main St. & A. P. R. Co. v. Traction Co., 129 Cal. 301, 61 Pac. 937; Westcott v. Mitchell, 95 Me. 377, 50 Atl. 21; Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485; Lingenfelder v. Brewing Co., 103 Mo. 578, 15 S. W. 844. *See "Contracts," Dec. Dig. (Key-No.) §§ 237, 244; Cent. Dig. §§ 1119–1122, 1128.*

[15] KING v. RAILWAY CO., 61 Minn. 482, 63 N. W. 1105, Throckmorton Cas. Contracts, 115; Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789 and note, 124 Am. St. Rep. 481, 14 Ann. Cas. 495 and note; Meech v. City of Buffalo, 29 N. Y. 198. *See "Contracts," Dec. Dig. (Key-No.) §§ 75, 237; Cent. Dig. §§ 273–285, 1119–1122.*

[16] KING v. RAILWAY CO., 61 Minn. 482, 63 N. W. 1105, Throckmorton, Cas. Contracts, 115, per Start, C. J. *See "Contracts," Dec. Dig. (Key-No.) §§ 75, 237; Cent. Dig. §§ 273–285, 1119–1123.*

[17] Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Rollins v. Marsh,

on the ground that a person who has entered into a contract is entitled to choose between going on with it at a loss and the risk of an action by the other party for the breach. This might be a sound doctrine if a contract were, according to Mr. Justice O. W. Holmes, Jr.'s,[18] conception of it, the mere taking of a risk; that is, if a party must be held to contemplate, when he gives a promise, not its performance, but the payment of damages for its breach, or performance, at his option, according as the one or the other may seem the more to his interest in the light of future developments. Such, however, does not seem the proper conception of contract. Certainly, as a rule, when a man makes a contract, he does so with the intention of performing it, and with the expectation of performance by the other party. If cannot be that a contract is nothing more than a mere gambling transaction—a mere bet on its performance. To allow a man who has promised, on a sufficient consideration, to repudiate his promise when he finds that he is to suffer loss, and force the other party to pay an additional sum in order to obtain what he is already entitled to, encourages breach of contract and breach of faith.

Promise to Third Person to Perform Existing Contract

In England and Massachusetts it has been held that if a man is bound by a contract to do a particular thing, and, while it is doubtful whether he will do it, a third person promises to pay him if he will do it, his performance will constitute a sufficient consideration for the third party's promise.[19] It is difficult, if not impossible, to reconcile such a case with the general rule which we have stated, or to find any reason for such an exception. In this country the contrary has been generally held.[20]

128 Mass. 116; Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209; Moore v. Locomotive Works, 14 Mich. 266; Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; Coyner v. Lynde, 10 Ind. 282; Cooke v. Murphy, 70 Ill. 96 (but see Moran v. Peace, 72 Ill. App. 135); Connelly v. Devoe, 37 Conn. 570; Lawrence v. Davey, 28 Vt. 264; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Foley v. Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442; Scanlon v. Northwood, 147 Mich. 139, 110 N. W. 493; Courtenay v. Fuller, 65 Me. 156. *See "Contracts," Dec. Dig. (Key-No.) §§ 75, 237; Cent. Dig. §§ 273–285, 1119–1122.*

[18] Holmes, The Common Law, 301.

[19] Shadwell v. Shadwell, 9 C. B. (N. S.) 159; Scotson v. Pegg, 6 Hurl. & N. 295; Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465; Cf. Grant v. Railway Co., 61 Minn. 395, 63 N. W. 1026. See 12 Harv. Law Rev. 520. *See "Contracts," Dec. Dig. (Key-No.) § 74; Cent. Dig. §§ 331–343.*

[20] Johnson's Adm'r v. Sellers' Adm'r, 33 Ala. 265; Putnam v. Woodbury, 68 Me. 58; L'Amoreux v. Gould, 7 N. Y. 349, 57 Am. Dec. 524; Peelman v. Peelman, 4 Ind. 612; Merrick v. Giddings, 1 Mackey (12 D. C.) 394; Davenport v. Society, 83 Wis. 387; Gordon v. Gordon, 56 N. H. 170; Hanks v. Barron, 95

Part Payment in Satisfaction of Debt

Under the rule we have been discussing, the simple payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditor's promise to forego the residue.[21] If, for instance, a person owes another $1,000, the payment of which may be demanded at once, a promise by the creditor to take $500 in full, and its payment, will not prevent his afterwards recovering the other $500.

This rule is well established and continues to be recognized by the courts.[22] It has, however, been the object of frequent and severe criticism, as failing to take into consideration the practical importance of the difference between a right to a thing and the actual possession of it, and as serving to defeat the ends of justice and common honesty.[23] This general feeling as to the injustice

Tenn. 275, 32 S. W. 195; Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 N. E. 873. See, also, Brownlee v. Lowe, 117 Ind. 420, 20 N. E. 301. *See "Contracts," Dec. Dig. (Key-No.) § 74; Cent. Dig. §§ 331–343.*

[21] Pinnel's Case, 5 Coke, 117a; Cumber v. Wane, 1 Strange, 426, 1 Smith, Lead. Cas. 439; JAFFRAY v. DAVIS, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, Throckmorton Cas. Contracts, 120 (collecting cases); Harriman v. Harriman, 12 Gray (Mass.) 341; Bailey v. Day, 26 Me. 88; Goodwin v. Follett, 25 Vt. 386; Barron v. Vandvert, 13 Ala. 232; Hayes v. Insurance Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Harrison v. Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; Bender v. Been, 78 Iowa, 283, 43 N. W. 216, 5 L. R. A. 649; Leeson v. Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597; Bryan v. Foy, 69 N. C. 45; Carlton v. Railroad Co., 81 Ga. 531, 7 S. E. 623; Liening v. Gould, 13 Cal. 598; Watts v. Frenche, 19 N. J. Eq. 407; Beaver v. Fulp, 136 Ind. 595, 36 N. E. 418; Lankton v. Stewart, 27 Minn. 346, 7 N. W. 360; Willis v. Gammill, 67 Mo. 730; St. Louis, F., S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. 377; Emmittsburg R. Co. v. Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Tyler v. Association, 145 Mass. 134, 13 N. E. 360; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522. And see cases cited in note 6, supra. For the same reason, a promise to take less than the sum due is also without consideration. McKenzie v. Culbreth, 66 N. C. 534; Foakes v. Beer, L. R. 9 App. Cas. 605; Rose v. Daniels, 8 R. I. 381; Smith v. Phillips, 77 Va. 548; Bryan v. Brazil, 52 Iowa, 350, 3 N. W. 117; Hart v. Strong, 183 Ill. 349, 55 N. E. 629. Nor is part payment any consideration for an agreement to extend the time for payment of the residue. Holliday v. Poole, 77 Ga. 159; Liening v. Gould, 13 Cal. 598; Barron v. Vandvert, 13 Ala. 232; Turnbull v. Brock, 31 Ohio St. 649. And see post, p. 614. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 60–65.*

[22] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785 and note; Melroy v. Kemmerer, 218 Pa. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888 and note. And see cases cited supra, note 21. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 60–65.*

[23] See Two Theories of Consideration by Prof. James Barr Ames, 12 Harv. L. R. 515, 525; Chicago, M. & St. P. Ry. v. Clark, 178 U. S. 353, 20 Sup. Ct.

of the rule has led the courts to narrow its scope wherever possible, and they have accordingly laid hold upon the slightest circumstances to take a case out of its operation.[24] Thus it has been held not to apply to unliquidated debts,[25] or where the payment is made before maturity, or at a different place from that at which the debtor was bound to make it,[26] or where an insolvent debtor in reliance on the creditor's promise to receive the part payment in satisfaction of the whole debt, refrained from taking advantage of the insolvency or bankruptcy law.[27]

So it has been held that since a person may, if he choose, make a gift to another which when accepted will be irrevocable, a creditor may, on receiving part of the debt, forgive the debtor the residue, and that a receipt in full may be evidence of such forgiveness.[28] In at least one jurisdiction the court has gone so far as to repudiate the rule altogether;[29] and in some states the rule has been changed by statute so that acceptance of a less sum in satisfaction of a debt is a discharge.[30]

Since a contract under seal requires no consideration, a creditor, on receiving part payment of his debt, may release the residue by an instrument under seal.[31]

924, 44 L. Ed. 1099; Melroy v. Kemmerer, 218 Pa. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888; First Nat. Bank of Nashville v. Shook, 100 Tenn. 436, 45 S. W. 338; Brown v. Kern, 21 Wash. 211, 57 Pac. 798. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 60–65.*

[24] See post, 162–165. [25] See post, 164. [26] See post, 163.

[27] Melroy v. Kemmerer, 218 Pa. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888; Herman v. Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922; Rotan Grocery Co. v. Noble, 36 Tex. Civ. App. 226, 81 S. W. 586. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) §§ 8, 10; Cent. Dig. §§ 60–74.*

[28] McKENZIE v. HARRISON, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638, Throckmorton Cas. Contracts, 365; Green v. Langdon, 28 Mich. 221; Tyler Cotton Press Co. v. Chevalier, 56 Ga. 494. See, also, Lamprey v. Lamprey, 29 Minn. 151, 12 N. W. 514. A receipt "in full of all demands," given because the other party refused to pay more without it, held binding. Flynn v. Hurlock, 194 Pa. 462, 45 Atl. 312. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 92–96.*

[29] Clayton v. Clark, 74 Miss. 499, 21 South. 565, 37 L. R. A. 771, 60 Am. St. Rep. 521. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 92–96.*

[30] This is the case in Alabama, Maine, North Carolina, Virginia, and Georgia. See Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227; Jones v. Wilson, 104 N. C. 9, 10 S. E. 79. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 92–96.*

[31] Bender v. Sampson, 11 Mass. 42; Willing v. Peters, 12 Serg. & R. (Pa.) 177; Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322; Spitze v. Railroad Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378. *See "Release," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 18–20.*

Same—Consideration for Release of Residue

The rule that part payment of a debt does not discharge the debtor does not apply where the creditor, in addition to the part payment, receives something else which the law regards of value, or, in other words, where, in the thing done or given, he receives something different in kind from that which he is entitled to demand;[82] and if the difference is real, so that something of value is superadded to the part payment, the fact that the difference or the value superadded is slight will make no difference, for, as we have seen, the courts will not determine the adequacy of the consideration. If a man sells and becomes bound to deliver to another two particular horses, delivering one of them will not sustain a promise by the buyer not to require delivery of the other; but it would be otherwise if the buyer agreed to receive some other particular horse or cow in discharge of the contract, though it might be of comparatively little value. A money debt may be discharged by the giving of a negotiable instrument for a less sum than due, or, as said in an old English case, "the gift of a horse, hawk, or robe, etc., in satisfaction, is good; for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction."[83]

If the debtor gives, and the creditor receives, in full satisfaction of the debt, the note of a third person for a smaller sum than the amount of the debt, there is a sufficient consideration for his promise to forego the residue;[84] and so it is where the smaller sum agreed to be taken is guarantied, or a note therefor is indorsed, by a third person;[85] or where the smaller sum is paid before the

[82] JAFFRAY v. DAVIS, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, Throckmorton Cas. Contracts, 120; Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Stacy v. Cook, 62 Kan. 50, 61 Pac. 399. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 60–65.*

[83] Pinnel's Case, 5 Coke, 117a. And see Hasted v. Dodge (Iowa) 85 N. W. 462. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 60–65.*

[84] Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Sanders v. Bank, 13 Ala. 353; Hardesty v. Graham (Ky.) 8 S. W. 909. Check of third person. Guild v. Butler, 127 Mass. 386. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) §§ 9, 11; Cent. Dig. §§ 88–91, 75–82.*

[85] Steinman v. Magnus, 11 East, 390; Singleton v. Thomas, 73 Ala. 205; Jenness v. Lane, 26 Me. 475; Maddux v. Bevan, 39 Md., at page 499; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; Varney v. Conery, 77 Me. 527, 1 Atl. 683; Mason v. Campbell, 27 Minn. 54, 6 N. W. 405. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) §§ 9, 11; Cent. Dig. §§ 88–91.*

debt is due, or at a different place than required by the contract;[36] or where a note secured by a mortgage is given for the smaller sum.[37]

Same—Unliquidated Claim

The rule that payment of less than the amount claimed is no consideration for a discharge applies only when the sum due is definite and certain. The payment of less than the amount claimed, if the sum due is unliquidated, is a good consideration for the release.[38] This proceeds upon the ground that the parties have agreed to settle an unliquidated claim, or, in other words, have agreed on an accord and satisfaction of such claim.[39]

Same—Compromise

We have already seen, in treating of forbearance as a consideration, that where a demand is made and disputed, or a suit is brought, the parties may enter into a compromise, and that the party upon whom the demand is made or against whom the suit is brought will be bound thereby. The consideration for his promise is the forbearance of the other party to insist on his original demand, or to further prosecute his action.[40] In such a case the creditor or plaintiff is also bound by the compromise. The settlement of the dispute and definite promise by the debtor is a consideration for his promise to forego any further claim. He

[36] Pinnel's Case, 5 Coke, 117a; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Harper v. Graham, 20 Ohio, 105; Schweider v. Lang, 29 Minn. 254, 18 N. W. 33, 43 Am. Rep. 202; McKenzie v. Culbreth, 66 N. C. 534; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Reid v. Hibbard, 6 Wis. 175; Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401. Cf. Saunders v. Whitcomb, 177 Mass. 457, 59 N. E. 192. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) §§ 9, 11; Cent. Dig. §§ 75–91.*

[37] JAFFRAY v. DAVIS, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, Throckmorton Cas. Contracts, 120; Post v. Bank, 138 Ill. 559, 28 N. E. 978. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) §§ 9, 11; Cent. Dig. §§ 75–91.*

[38] Wilkinson v. Byers, 1 Adol. & E. 106; Baird v. United States, 96 U. S. 430, 24 L. Ed. 703; Goss v. Ellison, 136 Mass. 503; Potter v. Douglass, 44 Conn. 541; Riley v. Kershaw, 52 Mo. 224; Ogborn v. Hoffman, 52 Ind. 439; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Sanford v. Abrams, 24 Fla. 181, 2 South. 373; Berdell v. Bissell, 6 Colo. 162; Stearns v. Johnson, 17 Minn. 142 (Gil. 116); Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; Chicago, M. & St. P. Ry. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099. But see Huff v. Logan (Ky.) 60 S. W. 483. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 67–74.*

[39] Tompkins v. Hill, 145 Mass. 379, 14 N. E. 177; post, p. 615. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 67–74.*

[40] Ante, p. 150.

cannot disregard the compromise on the ground that the debtor promised only what he was already bound to do.[41]

Same—Accord and Satisfaction

Whether the sum due is certain or uncertain, the consideration for the promise to forego the residue of the debt must be executed. It is not enough that the parties are agreed. Their agreement must be carried out if it is to be an answer to the original cause of action. Where it has been carried out, it is an accord and satisfaction. Where it has not been carried out it is an accord executory. As said in an old case: "Accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent."[42] This is a subject, however, which relates to the discharge of contract.[43]

Same—Composition with Creditors

A composition with creditors, whereby each creditor agrees to receive a certain proportion of the sum due him, seems, at first thought, to be an infraction of the rule that part payment of a debt is no discharge unless there is some consideration in addition to the part payment for the promise to forego the residue. The promise of the debtor to pay, or payment by him, of a portion of the debt, is not the consideration for the promises of the creditors to forego the balance.[44] The consideration must be and is something more than this.

In a leading English case Parke, J., said: "Here each creditor entered into a new agreement with the defendant [the debtor], the consideration of which, to the creditor, was the forbearance by all the other creditors who were parties, to insist upon their claims."[45] The view that the promise of each creditor is sustained by the consideration moving from the others has been frequent-

[41] Truax v. Miller, 48 Minn. 62, 50 N. W. 935; Sisson v. City of Baltimore, 51 Md. 83; Ogborn v. Hoffman, 52 Ind. 439; McCall v. Nave, 52 Miss. 494; Union Pac. R. Co. v. Anderson, 11 Colo. 293, 18 Pac. 24; Perkins v. Headley, 49 Mo. App. 556; Gates v. Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; Battle v. McArthur (C. C.) 49 Fed. 715; Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 5 Sup. Ct. 422, 28 L. Ed. 948; Slade v. Elevator Co., 39 Neb. 600, 58 N. W. 191; Town of Brandon v. Jackson, 74 Vt. 78, 52 Atl. 114; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623. *See "Contracts," Dec. Dig. (Key-No.) § 68; Cent. Dig. §§ 328–330.*

[42] Lynn v. Bruce, 2 H. Bl. 319. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 116–122.*

[43] Post, p. 615.

[44] Fitch v. Sutton, 5 East, 230. *See "Compositions with Creditors," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 8.*

[45] Good v. Cheesman, 2 Barn. & Adol. 335. *See "Compositions with Creditors," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 8.*

ly approved.[46] It has, however, met with criticism on the ground that the debtor, being a stranger to the consideration, cannot enforce such a contract.[47] Sir William Anson finds consideration moving from the debtor in his procurement of the promise by the other creditors to forbear.[48] On one ground or another such agreements are universally sustained.[49]

SAME—IMPOSSIBILITY AND VAGUENESS

77. IMPOSSIBLE PROMISE. **A promise to do something which is either impossible in law, or physically impossible, is no consideration. The thing must be impossible on its face; not merely improbable, or impossible to the promisor.**

78. VAGUE PROMISE. **A promise which is so vague and indefinite as to be incapable of enforcement is no consideration.**

Impossible Promise

The courts will also hold a consideration unreal, and therefore no consideration at all, where it is impossible upon its face. As will presently be seen, practical impossibility, unknown to the parties when they entered into their contract, may avoid it on the ground of mistake;[50] or impossibility of performance, arising subsequent to the making of the contract, may, under some circumstances, operate as a discharge;[51] but we are here concerned with promises to do a thing so obviously impossible that the promise can form no real consideration.

The consideration may be either (1) impossible in law, or (2) physically impossible. Where, for instance, a debtor made a promise to the servant of his creditor in consideration of a promise by the servant to release him from the debt, it was held that there was

[46] Williams v. Carrington, 1 Hilt. (N. Y.) 515; Perkins v. Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Brown v. Farnham, 48 Minn. 317, 51 N. W. 877. See, also, White v. Kuntz, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886. *See "Compositions with Creditors," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 8.*

[47] See Huffcutt, Anson, Cont. 108, note 1; Harriman, Cont. § 126.

[48] Anson, Cont. (8th Ed.) 90.

[49] Fellows v. Stevens, 24 Wend. (N. Y.) 294; Murray v. Snow, 37 Iowa, 410; Cheveront v. Textor, 53 Md. 295, 307; Falconbury v. Kendall, 76 Ind. 260; Robert v. Barnum, 80 Ky. 28; Pierce v. Jones, 8 Rich. (8 S. C.) 273, 28 Am. Rep. 288; Paddleford v. Thacher, 48 Vt. 574; Boyd v. Hind, 1 Hurl. & N. 938; Slater v. Jones, L. R. 8 Exch. 193; Stewart v. Langston, 103 Ga. 290, 30 S. E. 35. *See "Compositions with Creditors," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 8.*

[50] Post, p. 251.

[51] Post, p. 590.

no consideration for the debtor's promise, as the servant had no power to release the debt.[52] So, also, an undertaking that another's land shall sell for a given sum on a certain day has been held insufficient to support a promise, on the ground that a person cannot compel the sale of another's property.[53] In these cases the consideration is impossible in law. A promise to go from New York to London in a day would be physically impossible, and could form no consideration for a promise given in return.[54]

Impossibility, as used in this connection, does not mean anything more than a prima facie legal impossibility or physical impossibility "according to the state of knowledge of the day." [55] In the first case of legal impossibility mentioned above, the promisor might procure the release of the debt; and, in the second case, he might procure the owner of the land to sell it by the time specified. There is, however, a prima facie impossibility, and this is enough. So it may be that, in the future, means may be discovered by which one may be able to travel from New York to London in a day; but, according to the present state of knowledge, it is physically impossible. It was said in a New York case that if the promise be "within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld; as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible." [56]

[52] Harvey v. Gibbons, 2 Lev. 161. And see Ward v. Hollins, 14 Md. 158; Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480. *See "Contracts," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 382–387, 395.*

[53] Stevens v. Coon, 1 Pin. (Wis.) 356. *See "Contracts," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 382–387, 395.*

[54] See James v. Morgan, 1 Lev. 111; Thornborow v. Whiteacre, 2 Ld. Raym. 1164; Bennett v. Morse, 6 Colo. App. 122, 39 Pac. 582. A covenant by an applicant for life insurance that he will not die by his own hand while insane does not create a contract which will defeat recovery on the policy where the insured takes his life while insane, since the covenant was one impossible to observe, and known to be so by both parties. Kelley v. Insurance Co. (C. C.) 109 Fed. 56. *See "Contracts," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 382–387, 395.*

[55] Per Brett, J., Clifford v. Watts, L. R. 5 C. P. 577, 588. *See "Contracts," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 382–387, 395.*

[56] Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518, citing 3 Com. Dig. 93; 1 Rolle, Abr. 419. And see Watson v. Blossom, 50 Hun, 600, 4 N. Y. Supp. 489; Clifford v. Watts, L. R. 5 C. P. 588; The Harriman v. Emerick, 9 Wall. 161, 19 L. Ed. 629. *See "Contracts," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 382–387, 395.*

Vague Promise

Again, a consideration may be unreal because it is so vague in its terms as to be practically incapable of enforcement. In such case it may be classed with impossible considerations. Where, for instance, in an action on a note given by a son to his father the son pleaded a promise made by his father to discharge him from liability on the note in consideration of his ceasing to make certain complaints, which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children, it was said that the son's promise was no more than a promise "not to bore his father," and it was held too vague to constitute a consideration for the father's promise. "A man," said the court, "might complain that another person used the highway more than he ought to do, and that other might say, 'Do not complain, and I will give you £5.' It is ridiculous to suppose that such promises could be binding." [57] So a contract by which a person promised to erect "a permanent and first-class hotel for the accommodation of the traveling public, and maintain the same in a first class manner," in consideration of the promise of a railroad company that it, "by the patronage of its road, would support and maintain the same," has been held void, because the stipulations were too vague and indefinite.[58]

We have already sufficiently discussed the question of vagueness and uncertainty in agreements.[59]

LEGALITY OF CONSIDERATION

79. The consideration, to support a promise, must be legal; and therefore a promise to do or doing what is illegal is no consideration.[60]

It is well to state this rule here, as indicating a necessary element in consideration. It will be treated when we come to consider, as an element in the formation of contract, the legality of the objects for which the parties to a contract enter into it.

[57] White v. Bluett, 23 Law J. Exch. 36, 2 Com. Law Rep. 301. And see Ballou v. March, 133 Pa. 64, 19 Atl. 304. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

[58] HART v. RAILROAD CO., 101 Ga. 188, 28 S. E. 637, Throckmorton Cas. Contracts, 126. *See "Contracts," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 10–20.*

[59] Ante, p. 54.

[60] BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, Throckmorton Cas. Contracts, 290; Hatch v. Mann, 15 Wend. (N. Y.) 45; Hartley v. Rice, 10 East, 22. See post, p. 814 et seq. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

CONSIDERATION IN RESPECT OF TIME—PAST CONSIDERATION

80. A consideration may be executory or executed, but it cannot be past, except—

EXCEPTIONS [61]—(a) Where the past consideration was given at the request of the promisor.

(b) Where the promise is to pay for something voluntarily done by the promisee, which the promisor was legally bound to do.

(c) Where a person, by a new promise, revives an agreement by which he has benefited, but which is not void, but voidable or unenforceable against him, by reason of a rule of law, meant for his advantage, which he may waive.

Executory Consideration

The consideration for a promise is executory when it is a promise given in return to do something in the future. In regard to this, there is nothing to be added to what has already been said with regard to the nature of consideration in general. We have seen that a promise on one side is a good consideration for a promise on the other.

Executed Consideration

A contract arises upon an executed consideration when one of the parties has either in the act which amounts to a proposal or to an acceptance, as the case may be, done all that he is bound to do under the contract, leaving an outstanding liability on the other side only. The two forms of consideration thus suggested have been described as (1) acceptance of an executed consideration, and (2) consideration executed upon request.[62] They arise when the proposal is an offer of an act for a promise, and the act is accepted; or where it is an offer of a promise for an act, and the act is done.

In the first case a man offers his labor or goods under such circumstances that he obviously expects to be paid for them, and the contract arises when the labor or goods are accepted, the acceptor becoming bound to pay a reasonable price for them.[63] The consideration executed upon request, or the contract which arises on

[61] The first two exceptions are doubtful, post, pp. 171–173.

[62] Leake, Cont. 23.

[63] Ante, p. 19; Hoadley v. McLaine, 10 Bing. 482; Hart v. Mills, 15 Mees. & W. 87. *See "Contracts," Dec. Dig. (Key-No.) §§ 78, 79; Cent. Dig. §§ 354–381.*

the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services, which makes a binding promise to give the reward when the service is rendered. Under these circumstances, it is not the offeror, but the acceptor, who has done his part in becoming a party to the contract.[64] This form of consideration will support an implied as well as an express promise where a man is asked to perform certain services which will entail certain liabilities and expenses. Thus, where a person is employed to deal with property for a certain purpose, and, in the course of the employment, he is compelled to pay duties to the government, he may recóver the amount from his employer on an implied promise to repay.[65]

Past Consideration

Strictly, it is a misnomer to speak of a past "consideration," for it is in fact no consideration at all. A past consideration, so called, is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If, afterwards, whether from good feeling or interested motives it matters not, he makes a promise to the person by whom he has been so benefited, and that promise is made upon no other consideration than the past benefit, the promise is gratuitous, and cannot be enforced.[66] Thus, where a person who had previously sold a vicious horse without any warranty, either express or implied, afterwards promised that it was sound and free from vice, it was held that the promise was not binding for want of consideration.[67] So, also, it has repeatedly been held that services rendered in the past, but not at the ex-

[64] Ante, pp. 47, 48; England v. Davidson, 11 Adol. & El. 856. *See "Contracts," Dec. Dig. (Key-No.) §§ 78, 79; Cent. Dig. §§ 354–381.*

[65] "Whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference." Brittain v. Lloyd, 14 Mees. & W. 762. *See "Contracts," Dec. Dig. (Key-No.) § 78; Cent. Dig. §§ 354–356.*

[66] MOORE v. ELMER, 180 Mass. 15, 61 N. E. 259, Throckmorton Cas. Contracts, 128; Hunt v. Bate (1568) Dyer, 272; Bulkley v. Landon, 2 Conn. 404; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Chaffee v. Thomas, 7 Cow. (N. Y.) 358; Greene v. First Parish in Malden, 10 Pick. (Mass.) 500; Williams v. Hathaway, 19 Pick. (Mass.) 387; Wilson v. Edmonds, 24 N. H. 517; Marsh v. Chown, 104 Iowa, 556, 73 N. W. 1046; Stoneburner v. Motley, 95 Va. 784, 30 S. E. 364. Some of the earlier cases sustained, and many late cases seem to sustain, promises on a past consideration on the ground of moral obligation. Barnes v. Hedley, 2 Taunt. 184; Lee v. Muggeridge, 5 Taunt. 36. See ante, p. 136; post, p. 175. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[67] Roscorla v. Thomas, 3 Q. B. 234. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

press or implied request of the person benefited by them, will not support a promise by him to pay for them.[68] In a Michigan case in which liquor had been sold in violation of a statute, which was afterwards repealed, the court held that, as the contract was void, a promise by the buyer to pay, made after the statute was repealed, in consideration of the sale and of an extension of the time for payment originally agreed upon, was without consideration.[69] So, where the balance of a debt has been voluntarily and effectually released on payment of a part of it, a subsequent promise by the debtor to pay the part released cannot be enforced.[70]

Exceptions to the Rule as to Past Consideration

(1) It is generally declared a past consideration will support a subsequent promise if the consideration was given at the request of the promisor. In Lampleigh v. Braithwait the plaintiff sued for money which the defendant had promised to pay him for services rendered previous to the promise, at the defendant's request, but without any promise at the time of the request and of the rendition of the services. The court agreed "that a mere voluntary courtesy will not have consideration to uphold an assumpsit. But, if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit." [71] On principle, it

[68] Mills v. Wyman, 3 Pick. (Mass.) 207; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Dearborn v. Bowman, 3 Metc. (Mass.) 155; Allen v. Bryson, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358; Osier v. Hobbs, 33 Ark. 215; Ellicott v. Turner, 4 Md. 476. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[69] Ludlow v. Hardy, 38 Mich. 690. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[70] Hale v. Rice, 124 Mass. 299; Mason v. Campbell, 27 Minn. 54, 6 N. W. 405; Montgomery v. Lampton, 3 Metc. (Ky.) 519; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; Stafford v. Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366. But see Willing v. Peters, 12 Serg. & R. (Pa.) 177. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[71] Lampleigh v. Braithwait (A. D. 1615) Hob. 105, 1 Smith, Lead. Cas. 67. And see Sidenham v. Worlington (1585) 2 Leon. 224; Marsh v. Rainsford (1588) 2 Leon. 111; Riggs v. Bullingham (1599) Cro. Eliz. 715; Bosden v. Sir John Thenne (1603) Yelv. 40; Field v. Dale, 1 Rolle, Abr. 11; Boothe v. Fitzpatrick, 36 Vt. 681; Chaffee v. Thomas, 7 Cow. (N. Y.) 358; Dearborn v. Bowman, 3 Metc. (Mass.) 155; Comstock v. Smith, 7 Johns. (N. Y.) 87; Allen v. Woodward, 22 N. H. 544; Goldsby v. Robertson, 1 Blackf. (Ind.) 247; Carson v. Clark, 2 Ill. (1 Scam.) 113, 25 Am. Dec. 79; Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8,494; Wilson v. Edmonds, 24 N. H. 517. The previous request may be inferred from the beneficial character of the services, or other consideration, and the other circumstances. Hicks v. Burhans, 10 Johns. (N. Y.) 243; Oatfield v. Waring, 14 Johns. (N. Y.) 188; Wilson v. Ed-

would seem that, unless the services were rendered under such circumstances that the law would imply a promise to pay what they were worth, a subsequent promise would be without effect,[72] and that in that case the only effect of the subsequent promise would be as evidence of the value of the services.[73] In many of the cases, indeed, in which the exception was recognized the subsequent promise was coextensive with that which would have been implied by law. And in view of the repudiation of the doctrine of past consideration, the exception is discredited by modern text-writers.[74] Lampleigh v. Braithwait has, however, been followed in several recent cases in this country.[75]

Some cases even go so far as to say that even though the past consideration was rendered without request, yet, if it moved directly from the promisee to the promisor, and inured directly to the promisor's benefit, the subsequent promise is binding;[76] but these cases are doubtful, unless they can be sustained on the ground that the ratification of an unauthorized act is equivalent to a request.[77] It has been held that if the past consideration, though rendered at the request of the other party, was intended by both parties to be gratuitous, the subsequent promise to pay therefor is not supported by a consideration.[78]

(2) There is another exception, or possible exception, to the rule

monds, 24 N. H. 517. The rule laid down in Lampleigh v. Braithwait was literally adhered to in Ireland in a comparatively late case. Bradford v. Roulston, 8 Ir. C. L. 468. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[72] MOORE v. ELMER, 180 Mass. 15, 61 N. E. 259, Throckmorton Cas. Contracts, 128, in which it is said, per Holmes, C. J.: "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay." *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[73] See Kennedy v. Brown, 18 C. B. N. S. 677, per Earle, C. J. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[74] Anson, Cont. (8th Ed.) 98–100; Pollock, Cont. (3d Ed.) 187; Harriman, Cont. § 139.

[75] Pool v. Horner, 64 Md. 131, 20 Atl. 1036; Stuht v. Sweesy, 48 Neb. 767, 67 N. W. 748; Silverthorn v. Wylie, 96 Wis. 69, 71 N. W. 107; Montgomery v. Downey, 116 Iowa, 632, 88 N. W. 810. See, also, Daily v. Minninck, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[76] Boothe v. Fitzpatrick, 36 Vt. 681; Seymour v. Town of Marlboro, 40 Vt. 171; Doty v. Wilson, 14 Johns. (N. Y.) 378. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[77] Post, p. 173, note 83.

[78] Allen v. Bryson, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358; Osier v. Hobbs, 33 Ark. 215. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

in cases where one person has voluntarily done what another person was legally bound to do, and the latter afterwards promises to pay him therefor. The English cases usually cited in support of this rule all turned upon the liability of parish authorities for medical attendance upon paupers who were settled in one parish, but resident in another. It was held in all the cases that a suit could be maintained for services rendered against the parish legally bound to render them, which had, after their rendition, promised to pay for them. Some of the cases seem to base the decision on the ground that the moral obligation resting on the parish was sufficient to support its promise;[79] but, as we have seen, moral obligations cannot form a consideration.[80] Other cases seem to go on the ground that there was a legal obligation resting on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi contractual relation thus arose between the parties; or that there was knowledge on the part of the defendant parish of acts from which a contract might be implied, independent of the subsequent promise.[81] There is, to say the least, much doubt in regard to this exception.[82] In a Massachusetts case, however, in which the plaintiff had, without a prior request, paid money which the defendant was legally bound to pay, the court held that a subsequent promise by the defendant to reimburse him was "equivalent to a previous request," on "the well-established principle that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority."[83]

(3) The third exception, or apparent exception, to the rule that a past consideration will not support a promise is a substantial and important one, and one about which there is no doubt. It is found in those cases in which a person has been held capable of reviving an agreement by which he has benefited, but which, by reason of some rule of law meant for his advantage, which he may waive, is not enforceable against him. The principle upon which these cases rest

[79] Watson v. Turner, Bull. N. P. 147; Atkins v. Banwell, 2 East, 505; Wing v. Mill, 1 Barn. & Ald. 105. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381; "Paupers," Dec. Dig. (Key-No.) § 44; Cent. Dig. §§ 195–197.*

[80] Ante, p. 136; Mills v. Wyman, 3 Pick. (Mass.) 207. *See "Contracts," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 357–381; "Paupers," Dec. Dig. (Key-No.) § 44; Cent. Dig. §§ 195–197.*

[81] Paynter v. Williams, 1 Cromp. & M. 810. *See "Paupers," Dec. Dig. (Key-No.) § 44; Cent. Dig. §§ 195–197.*

[82] Anson, Cont. (8th Ed.) 100–102.

[83] Gleason v. Dyke, 22 Pick. (Mass.) 390. And see Doty v. Wilson, 14 Johns. (N. Y.) 382. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

is "that, where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law, and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." [84] Thus a new promise made by a bankrupt or insolvent who has been discharged from debts by a certificate of bankruptcy, or by insolvency proceedings, to pay a debt, has been upheld without further consideration.[85] So a promise by a person, after becoming of age, to pay debts contracted during infancy, and which could not be enforced, is binding on him.[86] Some courts have held that a promise by a woman during widowhood or after divorce, to fulfill promises made during coverture, is binding;[87] but most courts hold that as a married woman's contract, unlike an infant's, is void, and not merely voidable, her new promise after the death of her husband, or after a divorce has been

[84] Parke, B., in Earle v. Oliver, 2 Exch. 71; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; Turlington v. Slaughter, 54 Ala. 195; Lonsdale v. Brown, 4 Wash. C. C. 86, Fed. Cas. No. 8,493. Promise by the owner of a building to pay for materials furnished by a contractor who has failed to comply with the mechanic's lien law. Morse v. Crate, 43 Ill. App. 513. See *"Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[85] Trueman v. Fenton, Cowp. 544; DUSENBURY v. HOYT, 53 N. Y. 521, 13 Am. Rep. 543, Throckmorton Cas. Contracts, 129; Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Shippey v. Henderson, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458; Yates' Adm'rs v. Hollingsworth, 5 Har. & J. (Md.) 216; Katz v. Moessinger, 110 Ill. 372; Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461; Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Carey v. Hess, 112 Ind. 398, 14 N. E. 235; Knapp v. Hoyt, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Hobough v. Murphy, 114 Pa. 358, 7 Atl. 139; Murphy v. Crawford, 114 Pa. 496, 7 Atl. 142; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Succession of Audrieu, 44 La. Ann. 103, 10 South. 388; Christie v. Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Higgins v. Dale, 28 Minn. 126, 9 N. W. 583. But not if debt is voluntarily released. Stafford v. Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366. See ante, p. 163. Promise by third person to pay discharged debt. Webster v. Le Compte, 74 Md. 249, 22 Atl. 232. *See "Bankruptcy," Dec. Dig. (Key-No.) § 434; Cent. Dig. §§ 853–866; "Contracts," Cent. Dig. § 361.*

[86] Williams v. Moor, 11 Mees. & W. 263; Tibbetts v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Bliss v. Perryman, 1 Scam. (Ill.) 484; Reed v. Batchelder, 1 Metc. (Mass.) 559; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Heady v. Boden, 4 Ind. App. 475, 30 N. E. 1119; Edmond's Case (1586) 3 Leon. 164. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 157; "Contracts," Cent. Dig. § 367.*

[87] Lee v. Muggeridge, 5 Taunt. 36 (this was on the ground of moral obligation); Brown v. Bennett, 75 Pa. 420; Sharpless' Appeal, 140 Pa. 63, 21 Atl. 239; Goulding v. Davidson, 26 N. Y. 604. *See "Husband and Wife," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 358–361; "Contracts," Cent. Dig. §§ 365, 366.*

obtained, is without consideration.[88] So, also, a debt barred by the statute of limitations may be revived by a new promise to pay it, and the new promise may be implied from a mere acknowledgment of the debt.[89] And an indorser on a note, who has been discharged from liability from want of notice of nonpayment, may waive his discharge.[90] It has even been held, where bills, void for usury, were renewed after the usury laws had been repealed, the consideration for the renewal being the past loan, that the new bills were valid.[91]

There is undoubtedly in all of these cases a moral obligation to fulfill the unenforceable promise, and many of the decisions, both old and modern, base the validity of the new promise on the ground of the moral obligation, thereby making this class of cases an exception to the rule that a moral obligation cannot support a promise.[92] If the effect of these cases is to make such an exception, it

[88] Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762; Porterfield v. Butler, 47 Miss. 165, 12 Am. Rep. 329; Meyer v. Howarth, 8 Adol. & El. 467; Waters v. Bean, 15 Ga. 358; Putnam v. Tennyson, 50 Ind. 456; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Kent v. Rand, 64 N. H. 45, 5 Atl. 760; Valentine v. Bell, 66 Vt. 280, 29 Atl. 251; Wilcox v. Arnold, 116 N. C. 708, 21 S. E. 434; Thompson v. Hudgins, 116 Ala. 93, 22 South. 632; Holloway's Assignee v. Rudy (Ky.) 60 S. W. 650. A promise by a married woman, having a separate estate, to pay for necessaries furnished her on the credit of such estate, is a sufficient consideration for a new promise after the death of her husband. Sherwin v. Sanders, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750. *See "Husband and Wife," Dec. Dig. (Key-No.) § 89; Cent. Dig. §§ 358–361; "Contracts," Cent. Dig. §§ 365, 366.*

[89] Ilsley v. Jewett, 3 Metc. (Mass.) 439; Keener v. Crull, 19 Ill. 189; Walker v. Henry, 36 W. Va. 100, 14 S. E. 440; Little v. Blunt, 9 Pick. (Mass.) 488; Pittman v. Elder, 76 Ga. 371; Pierce v. Wimberly, 78 Tex. 187, 14 S. W. 454; Hall v. Bryan, 50 Md. 194; Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495. But a deceased person's debt which is barred will not support his widow's promise to pay it. Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862. *See "Limitation of Actions," Dec. Dig. (Key-No.) § 145; Cent. Dig. § 592.*

[90] Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1; Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 422, 423; Cent. Dig. §§ 1196–1222.*

[91] Flight v. Reed, 1 Hurl. & C. 703; Hammond v. Hopping, 13 Wend. (N. Y.) 505. See Barnes v. Hedley, 2 Taunt. 184. But see Ludlow v. Hardy, 38 Mich. 690; ante, p. 136; and dissenting opinion of Martin, B., in Flight v. Reed, supra. *See "Bills and Notes," Dec. Dig. (Key-No.) § 139; Cent. Dig. § 354; "Usury," Dec. Dig. (Key-No.) § 67; Cent. Dig. §§ 140, 141; "Contracts," Cent. Dig. § 379.*

[92] Edmond's Case (1586) 3 Leon. 164; Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Turlington v. Slaughter, 54 Ala. 195; Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780; Carey v. Hess, 112 Ind. 398, 14 N. E. 235; Hobough v. Murphy, 114 Pa. 358, 7 Atl. 139; Murphy v. Crawford, 114 Pa. 496, 7 Atl. 142; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Succession of Audrieu, 44

is unfortunate, to say the least, for there is much dicta to the effect that a moral obligation can never support a promise.[92] It would seem much better to base the validity of such promises, not on the moral obligation, but on the prior agreement, supported by a valuable consideration, and the right of the promisor to waive the technical rules of law, meant for his benefit, and which render it unenforceable.

La. Ann. 103, 10 South. 388. See post, p. 876. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

[92] Mills v. Wyman, 3 Pick. (Mass.) 207. And see ante, p. 130 et seq., and cases cited. *See "Contracts," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 357–381.*

CHAPTER VI

CAPACITY OF PARTIES.

81. In General.
82–83. Political Status—States and United States.
84. Foreign States and Sovereigns.
85–88. Aliens.
89. Convicts.
90. Professional Status.
91–94. Infants—In General.
95–97. Liability for Necessaries.
98. Ratification and Avoidance.
99–101. Who may Avoid Contract.
102–104. Time of Avoidance.
105–107. What Amounts to Ratification.
108. What Amounts to Disaffirmance.
109. Extent of Ratification or Disaffirmance.
110–111. Return of Consideration.
112–114. Effect of Ratification and Disaffirmance.
115–116. Torts in Connection with Contracts.
117. Insane Persons—In General.
118–121. Ratification and Avoidance.
122–123. Drunken Persons.
124. Married Women.
125–128. Corporations.

Thus far we have been dealing with the contract itself, and those elements in its formation which are essential to give it even a prima facie validity. Communication by offer and acceptance, and form or consideration, or, in some cases, both form and consideration, are necessary to every agreement that is to be considered by courts of law; but this is not all. When we have constructed an apparently binding contract, it is necessary, before we can pronounce finally upon its validity, to look to the parties to it, and ask who made it, under what circumstances, and with what object. In other words, we have to inquire whether the parties were capable of contracting, whether their apparent consent was genuine, and whether their object was legal.[1] In this chapter we shall consider the question of the capacity of the parties.

[1] See Anson, Cont. (4th Ed.) 102.

IN GENERAL

81. Incapacity to contract may arise from the following causes:
(a) Political status. In this connection we will consider contracts by
(1) The United States or state governments;
(2) Foreign sovereigns or states, and their representatives;
(3) Aliens;
(4) Convicts.
(b) Professional status, as in the case of professional contracts by
(1) Attorneys;
(2) Physicians; and
(3) In some jurisdictions, other professional persons.
(c) Youth, as in the case of infants.
(d) Permanent or temporary mental aberration, as in the case of
(1) Idiocy;
(2) Insanity;
(3) Drunkenness.
(e) Merger of capacity, as in case of married women.
(f) Artificiality of construction, as in the case of corporations.

POLITICAL STATUS—STATES AND UNITED STATES

82. The United States and the states may enter into contracts through their authorized agents, but only in furtherance of the objects of government, and subject to the limitations of the constitution.

83. They may sue on their contracts, but cannot be sued unless they submit thereto. This, however, they have very generally done by statutory or constitutional provisions.

The power of the United States government and the government of a state to enter into contracts in furtherance of objects for which the government was established, and not prohibited by constitutional limitations, is an incident to the general right of sovereignty. The question arose in the supreme court of the United States in a case in which it was held that a voluntary bond, taken by authority of the proper officers of the treasury department intrusted with the disbursement of public moneys to secure the fidelity in official duties of a receiver or disbursing agent, was a binding contract between him and his sureties and the United States, though

the bond was not prescribed by any positive law. "Upon full consideration of this subject," said the court, "we are of opinion that the United States have such capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and, the United States being a body politic, may, within the sphere of the political powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the proper exercise of those powers. * * * To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine to such an extent is not known to this court as ever having been sanctioned by any judicial tribunal." [2] The same doctrine applies to contracts by the state government.[3]

A contract, however, to bind the government, must be made by its authorized agent, and parties dealing with its agent must see at their peril that the agent has actual authority.[4] Likewise, it must be made in the form prescribed by statute, if any.[5]

Where the government enters into a contract, whether a negotiable instrument or otherwise, which it has authority to make, it is bound in any court to whose jurisdiction it submits by the same principles that govern individuals in their relation to such contracts.[6]

[2] United States v. Tingey, 5 Pet. 115, 8 L. Ed. 66. And see United States v. Lane, 3 McLean, 365, Fed. Cas. No. 15,559. *See "States," Dec. Dig. (Key-No.) §§ 90, 91; Cent. Dig. § 89; "United States," Dec. Dig. (Key-No.) § 59; Cent. Dig. § 42.*

[3] Danolds v. State, 89 N. Y. 37, 42 Am. Rep. 277; Dikes v. Miller, 25 Tex. Supp. 281, 78 Am. Dec. 571. *See "States," Dec. Dig. (Key-No.) §§ 90, 91; Cent. Dig. § 89.*

[4] The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169; Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882. See Tiffany, Ag. 201. By an act of Congress [Act May 1, 1820, c. 52, § 6, 3 St. at L. 568] no contract may be made by the secretary of state or treasury, or the department of war or navy, except under a statute authorizing it. Fowler v. United States, 3 Ct. Cl. 43. *See "United States," Dec. Dig. (Key-No.) § 60; Cent. Dig. § 43.*

[5] Contracts on behalf of the United States are required by various acts of Congress to be in writing and signed by the contracting parties, and such statutes have been held mandatory, rendering void contracts not made in compliance therewith. Clark v. United States, 95 U. S. 539, 24 L. Ed. 518. And see Camp v. United States, 113 U. S. 648, 5 Sup. Ct. 687, 24 L. Ed. 1081. *See "United States," Dec. Dig. (Key-No.) § 65; Cent. Dig. § 48.*

[6] The Floyd Acceptances, supra; Danolds v. State, supra; Patton v. Gilmer, 42 Ala. 548, 94 Am. Dec. 665; United States v. Ingate (C. C.) 48 Fed. 251. *See "United States," Dec. Dig. (Key-No.) § 70; Cent. Dig. § 53.*

At common law the sovereign cannot be sued without his consent, and this doctrine prevents suits against a state or against the United States, in the absence of permission by virtue of some statutory or constitutional provision.[7] Thus a bond or other contractual obligation of a state may not be enforced by a private individual,[8] but under the provision of the federal constitution conferring upon the United States supreme court jurisdiction in controversies between states, it may be enforced by another state.[9] There are, however, in most of the states, provisions allowing suit in some form by individuals against the state;[10] and the United States may be proceeded against in the court of claims,[11] and in some cases in the other federal courts.[12] A state or the United States has the same right as an individual to maintain an action on a contract made with it,[13] and it is the proper party to maintain such an action.

[7] United States v. Clarke, 8 Pet. 436, 8 L. Ed. 1001; Troy & G. R. Co. v. Com., 127 Mass. 43; Ottawa County v. Aplin, 69 Mich. 1, 36 N. W. 702; President, etc., of Michigan State Bank v. Hammond, 1 Doug. (Mich.) 527; Same v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; Pattison v. Shaw, 6 Ind. 377; Lowry v. Thompson, 25 S. C. 416, 1 S. E. 141; People v. Talmage, 6 Cal. 257; Taylor v. Hall, 71 Tex. 206, 9 S. W. 148; Galbes v. Girard (C. C.) 46 Fed. 500; Ferris v. Land Co., 94 Ala. 557, 10 South. 607, 33 Am. St. Rep. 146. An action against a state or United States officer, which is in effect against the state or the United States, is within the rule. Ottawa County v. Aplin, 69 Mich. 1, 36 N. W. 702; Taylor v. Hall, 71 Tex. 206, 9 S. W. 148; Aplin v. Board, 73 Mich. 182, 41 N. W. 223, 16 Am. St. Rep. 576; Mills Pub. Co. v. Larrabee, 78 Iowa, 97, 42 N. W. 593; North Carolina v. Temple, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. Ed. 849; Brown University v. Rhode Island College (C. C.) 56 Fed. 55. *See "United States," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 113, 114.*

[8] Const. U. S. Amend. 11; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842. *See "States," Dec. Dig. (Key-No.) § 191; Cent. Dig. §§ 179–184; "Corporations," Cent. Dig. § 1910.*

[9] Const. U. S. art. 3, § 2, cl. 1; South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448. *See "States," Dec. Dig. (Key-No.) § 191; Cent. Dig. §§ 179–184.*

[10] Wesson v. Commonwealth, 144 Mass. 60, 10 N. E. 762; Green v. State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; Hoagland v. State (Cal.) 22 Pac. 142; Board of Education of Granville County v. State Board, 106 N. C. 81, 10 S. E. 1002. *See "States," Dec. Dig. (Key-No.) § 191; Cent. Dig. §§ 179–184.*

[11] Nicholl v. United States, 7 Wall. 122, 19 L. Ed. 125; Finn v. United States, 123 U. S. 227, 8 Sup. Ct. 82, 31 L. Ed. 128; United States v. Cumming, 130 U. S. 452, 9 Sup. Ct. 583, 32 L. Ed. 1029. *See "Courts," Dec. Dig. (Key-No.) § 449; Cent. Dig. §§ 1163–1181.*

[12] Torrey v. United States (C. C.) 42 Fed. 207; Bowe v. United States, Id. 761. *See "Courts," Dec. Dig. (Key-No.) § 302; Cent. Dig. §§ 843, 986.*

[13] State v. Grant, 10 Minn. 39 (Gil. 22); State v. Burkeholder, 30 W. Va. 593, 5 S. E. 439; People v. City of St. Louis, 5 Gilman (Ill.) 351, 48 Am. Dec. 339; Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615; United States v. Holmes (C. C.) 105 Fed. 41. *See "States," Dec. Dig. (Key-No.) § 191; Cent.*

SAME—FOREIGN STATES AND SOVEREIGNS

84. Foreign sovereigns and states and their representatives may make contracts and sue thereon in our courts, but they cannot be sued unless they submit.

Foreign states and sovereigns and their representatives, and the officials and household of their representatives, are not subject to the jurisdiction of our courts unless they submit to it.[14] A contract, therefore, entered into with such persons, cannot be enforced against them unless they so choose, but it may be enforced by them.[15]

SAME—ALIENS

85. An alien, not an alien enemy, has in most jurisdictions the some power to contract that a subject has, and may in like manner sue and be sued on his contracts. In some jurisdictions he cannot acquire or hold land.

86. ALIEN ENEMIES—An alien enemy cannot, as a rule, without leave of the government, make any contract with a subject, or enforce any existing contract, during the continuance of hostilities.

87. He may be sued on existing contracts, and in such a case he may defend.

88. Pre-existing contracts are not dissolved by the war unless they are of a continuing nature.

An alien is said to be a person born out of the jurisdiction of the United States, subject to some foreign government, who has not been naturalized under their constitution and laws,[16] but under our statutes this is not strictly true. It is not within the scope

Dig. §§ *179–184; "United States," Dec. Dig.* (*Key-No.*) § *125; Cent. Dig.* §§ *113, 114.*

[14] Taylor v. Best, 14 C. B. 487. *See "Courts," Dec. Dig.* (*Key-No.*) § *321; Cent. Dig.* §§ *845–849.*

[15] See King of Prussia v. Kuepper's Adm'r, 22 Mo. 550, 66 Am. Dec. 639; The Sapphire v. Napoleon III, 11 Wall. 164, 20 L. Ed. 127; Republic of Colombia v. Cauca Co. (C. C.) 106 Fed. 337; King of Spain v. Oliver, Fed. Cas. No. 7,814, 2 Wash. (C. C.) 429. *See "Courts," Dec. Dig.* (*Key-No.*) § *321; Cent. Dig.* §§ *845–849.*

[16] 2 Kent, Comm. 50; Dawson v. Godfrey, 4 Cranch, 321, 2 L. Ed. 634; Ainslie v. Martin, 9 Mass. 456. *See "Aliens," Dec. Dig.* (*Key-No.*) § *1; Cent Dig.* § *1.*

of this work to go fully into this question. The statutes and decisions must be consulted.[17] The right of aliens to take, hold, and dispose of property, real or personal, is generally regulated by the states. In some states aliens are prohibited from acquiring and holding real property, while in others nonresidents are not given such right, while residents are; but in many states aliens, whether resident or not, have the same rights in this respect as native-born subjects.[18] In most, if not in all, the states they have the power to make and enforce contracts in respect to personal property, and such contracts may be enforced against them.[19] The rule does not apply to alien enemies.

Alien Enemies [20]

An alien enemy is one who is the subject or citizen of some hostile state or power. War suspends all commercial intercourse between the belligerent countries, except so far as may be allowed by the sovereign authority, and all contracts which tend to increase the resources of the enemy or involve commercial dealing between the two countries are prohibited.[21] Nor can an alien

[17] As to who are aliens, see State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; Boyd v. Nebraska ex rel. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103; State v. Andriano, 92 Mo. 70, 4 S. W. 263; Charles Green's Son v. Salas (C. C.) 31 Fed. 106; Ware v. Wisner (C. C.) 50 Fed. 310; City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576; Comitis v. Parkerson (C. C.) 56 Fed. 556, 22 L. R. A. 148; minor children of naturalized foreigners, State v. Andriano, 92 Mo. 70, 4 S. W. 263; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602. Alien woman marrying a citizen becomes a citizen. Ware v. Wisner (C. C.) 50 Fed. 310. Minor children of foreign parents, whose mother, after the death of the father, marries a citizen, become citizens. Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. Children born abroad of American citizens are citizens. Ware v. Wisner (C. C.) 50 Fed. 310. *See "Aliens," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 1.*

[18] See Milliken v. Barrow (C. C.) 55 Fed. 148; Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; McCreery's Lessee v. Allender, 4 Har. & McH. (Md.) 409; Zundell v. Gess, 73 Tex. 144, 10 S. W. 693; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; Furenes v. Mickleson, 86 Iowa, 508, 53 N. W. 416; Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. 93. *See "Aliens," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 5–10.*

[19] Taylor v. Carpenter, 3 Story, 458, Fed. Cas. No. 13,784; Franco-Texan Land Co. v. Chaptive (Tex. Sup.) 3 S. W. 31. *See "Aliens," Dec. Dig. (Key-No.) §§ 14, 16; Cent. Dig. §§ 59, 61–66.*

[20] Post, p. 361.

[21] Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; United States v. Grossmayer, 9 Wall. 72, 19 L. Ed. 627; New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453; Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658; O'Mealey v. Wilson, 1 Camp. 482; Phillips v. Hatch, 1 Dill. 571, Fed. Cas. No. 11,094; Hill v. Baker, 32 Iowa, 302, 7 Am. Rep. 193; Masterson v. Howard, 18 Wall. 99, 21 L. Ed. 764; Mutual Ben. Life

enemy enforce any existing contract [22] during the continuance of hostilities. These rules were applied to contracts between the respective citizens of the Northern and Southern states during the Civil War.[23] Though an alien enemy cannot sue on contracts during the continuance of hostilities, he may be sued, and in such case he may defend.[24]

Same—Pre-existing Contracts

Whether a pre-existing contract is dissolved or not by the war depends upon whether it is essentially antagonistic to the laws governing a state of war. If it is of a continuing nature, as in the case of a partnership, or of an executory character merely, and in the performance of its essential features would violate such laws, it would be dissolved; but, if not, and rights have become vested under it, the contract will either be qualified, or its performance suspended, according to its nature, so as to strip it of its objectionable features, and save such rights. The tendency of adjudication is to preserve, and not to destroy, contracts existing before the war.[25]

SAME—CONVICTS

89. In this country a convict can in most jurisdictions, unless prohibited by statute, make contracts, and sue and be sued thereon.

At common law a person convicted of treason or felony was said to be civilly dead. He was not incapable of contracting, and

Ins. Co. v. Hillyard, 37 N. J. Law, 444, 18 Am. Rep. 741; Wright v. Graham, 4 W. Va. 430; Habricht v. Alexander, 1 Woods, 413, Fed. Cas. No. 5,886; De Jarnette v. De Giverville, 56 Mo. 440. *See "War," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 64–79.*

[22] Brooke v. Filer, 35 Ind. 402; Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749; Semmes v. Insurance Co., 36 Conn. 543, Fed. Cas. No. 12,651. *See "War," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 26–36; "Insurrection," Cent. Dig. § 3.*

[23] See cases in preceding notes.

[24] Dorsey v. Thompson, 37 Md. 25; McVeigh v. United States, 11 Wall. 259, 20 L. Ed. 80; Mixer v. Sibley, 53 Ill. 61; McNair v. Toler, 21 Minn. 175. See Clarke v. Morey, 10 Johns. (N. Y.) 69. *See "War," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 26–36.*

[25] Mutual Ben. Life Ins. Co. v. Hillyard, 37 N. J. Law, 444, 18 Am. Rep. 741; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Semmes v. City Fire Ins. Co., 36 Conn. 543, Fed. Cas. No. 12,651; Bank of New Orleans v. Matthews, 49 N. Y. 12; Cohen v. Insurance Co., 50 N. Y. 610, 10 Am. Rep. 522; Washington University v. Finch, 18 Wall. 106, 21 L. Ed. 818; Whelan v. Cook, 29 Md. 1; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; Dorsey v. Thompson, 37 Md. 25. *See "War," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 26–36.*

his contracts could be enforced against him; but he could not invoke the aid of the courts for their enforcement.[26] The subject is now regulated in England by statutes, which declare convicted felons incapable of making any contract, and provide for the transfer of their property to trustees, who are given power to make contracts in regard to it.[27]

With us the common-law rule is not recognized to any extent, and a convict undergoing a sentence of imprisonment, or even awaiting execution of a sentence of death, may, in the absence of statutory restrictions, enter into contracts, and sue or be sued thereon.[28] In some states, however, there are statutes declaring that a sentence of imprisonment in the penitentiary shall suspend all civil rights, and if for life shall render the convict civilly dead; and such statutes have been construed to impose the same consequences as civil death at common law.[29] In some states, also, the statutes provide, as in England, for the transfer of the convict's property to trustees, with power to administer it and make contracts in regard to it.[30] The disability continues only during the imprisonment, and upon his receiving a pardon or serving out his sentence the convicted person is restored to the control of his property and his power to contract.[31]

PROFESSIONAL STATUS

90. In England a barrister cannot sue upon a contract for compensation for his services, but this disability does not exist in the United States.

In England, a barrister cannot sue for fees due him for services rendered in the ordinary course of his professional duties, either

[26] Kynnaird v. Leslie, L. R. 1 C. P. 389, 12 Jur. N. S. 468, 35 L. J. C. P. 226, 14 L. T. Rep. N. S. 756, 14 Wkly. Rep. 761. And see Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368. *See "Convicts," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 3.*

[27] 54 Geo. III, c. 45; 33 & 34 Vict. c. 23. See Avery v. Everett, supra. *See "Convicts," Dec. Dig. (Key-No.) §§ 3, 4; Cent. Dig. §§ 2, 3, 8.*

[28] Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118; Willingham v. King, 23 Fla. 478, 2 South. 851; In re Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111. And see Dade Coal Co. v. Haslett, 83 Ga. 549, 10 S. E. 435. *See "Convicts," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 3.*

[29] Avery v. Everett, supra; Smith v. Becker, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141; In re Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111. *See "Convicts," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 3.*

[30] Smith v. Becker, supra; Williams v. Shackelford, 97 Mo. 322, 11 S. W. 222. *See "Convicts," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 3.*

[31] In re Deming, 10 Johns. (N. Y.) 232. *See "Convicts," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 3.*

upon an implied or an express contract. Formerly a physician was so far in the same position as a barrister that, until the law was changed by statute, the rendition of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. But these disabilities are not to any extent recognized in this country.[82] There are, indeed, in most, if not all, the states, statutes prescribing certain requisites to entitle a physician, attorney, and certain other professional men to practice, such as the taking out of a license; and, until he has complied with the statute, he has no right to practice, and contracts made with him for professional services are void. This, however, is properly for treatment later.[83]

INFANTS—IN GENERAL

91. Some contracts of an infant are valid, and a few, in some jurisdictions, are absolutely void, but most of his contracts are simply voidable at his option.

92. VALID CONTRACTS—The valid contracts of an infant are:
(a) Contracts created by law, or quasi contracts.
(b) Contracts entered into under authority or direction of law.
(c) Contracts made in order to do what he was legally bound to do, and could have been compelled to do.

93. VOID CONTRACTS—In some jurisdictions a contract of an infant which is manifestly and without doubt to his prejudice is void.

94. VOIDABLE CONTRACTS—The tendency is to hold all contracts other than valid ones simply voidable at the infant's option.

In General

An infant, at common law, is a person under twenty-one years of age, whether male or female; but in some jurisdictions, by

[82] Vilas v. Downer, 21 Vt. 419; Garrey v. Stadler, 67 Wis. 248, 30 N. W. 787, 58 Am. Rep. 877; Price v. Hay, 132 Ill. 543, 24 N. E. 620; Boyd v. Lee, 36 S. C. 19, 15 S. E. 332. In New Jersey, counsel fees, as such, cannot be recovered in the absence of an express agreement. Van Atta v. McKinney's Ex'rs, 16 N. J. Law, 235; Blake v. City of Elizabeth, 2 N. J. Law J. 328, Fed. Cas. No. 1,495; Hopper v. Ludlum, 41 N. J. Law, 182. It is otherwise where there is an express agreement to pay for them. Zabriskie v. Woodruff, 48 N. J. Law, 610, 7 Atl. 336. *See "Attorney and Client," Dec. Dig. (Key-No.) §§ 158, 159; Cent. Dig. §§ 358, 361; "Physicians and Surgeons," Dec. Dig. (Key-No.) § 24; Cent. Dig. §§ 53–62.*

[83] See post, p. 325.

statute, females attain their majority at eighteen, either for all purposes or for particular purposes specified in the statute. Since the common law, as a rule, does not regard fractions of a day, an infant becomes of age on the beginning of the day before his or her twenty-first or eighteenth birthday, as the case may be.[84]

As we shall see, the contracts of an infant, as a rule, are not void, but simply voidable at his option. The rule is intended for the infant's benefit; and it may therefore be said that infancy in effect confers a privilege, rather than imposes a disability.

Emancipation of an infant by his parent gives him the right to his earnings, and releases him from his parent's control, but it does not remove his disability, and clothe him with the power to contract.[85] So statutes removing the common-law disabilities of married women do not operate to remove the disabilities of infancy from an infant married woman.[86]

The Old Doctrine as to the Effect of an Infant's Contract

There is much confusion and conflict in the authorities as to the effect of the contracts of infants. In an early English case the doctrine was stated to be that (1) where the court could pronounce the contract for the benefit of the infant, as for necessaries, it was good; (2) that where the court could pronounce it to be to his prejudice it was void; and (3) that in those cases where the benefit or prejudice were uncertain the contract was voidable only.[87] And the same doctrine has been laid down by some of the American courts and text writers.[88]

This cannot, however, be accepted as a correct statement of the law to-day. In the first place, many contracts are binding on an

[84] Metc. Cont. (Heard's Ed.) 43; Herbert v. Turball, 1 Keble, 589, Ewell's Cas. 1; Bardwell v. Purrington, 107 Mass. 419; State v. Clarke, 3 Har. (Del.) 557; Hamlin v. Stevenson, 4 Dana (Ky.) 597; Wells v. Wells, 6 Ind. 447; Linhart v. State, 33 Tex. Cr. R. 504, 27 S. W. 260. *See "Time," Dec. Dig. (Key-No.) § 11; Cent. Dig. § 53.*

[85] Mason v. Wright, 13 Metc. (Mass.) 306; Tyler v. Fleming, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Genereux v. Sibley, 18 R. I. 43, 25 Atl. 345; Wickham v. Torley, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57 [cit. Clark on Contracts (2d Ed.) 150]. *See "Infants," Dec. Dig. (Key-No.) §§ 9, 46; Cent. Dig. §§ 10, 98–110.*

[86] Shipley v. Smith, 162 Ind. 526, 70 N. E. 803. *See "Infants," Dec. Dig. (Key-No.) § 10; Cent. Dig. § 11.*

[87] Keane v. Boycott, 2 H. Bl. 511. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[88] Vent v. Osgood, 19 Pick. (Mass.) 572; Tucker v. Moreland, 10 Pet. 65, 9 L. Ed. 345; Owen v. Long, 112 Mass. 403; Dunton v. Brown, 31 Mich. 182; Green v. Wilding, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696; Robinson v. Weeks, 56 Me. 102. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

infant without regard to whether they are for his benefit or not. In the second place, the great weight of authority is against making any distinction between contracts of an infant as being void or voidable, and in favor of holding all contracts other than valid ones, with a very few exceptions, simply voidable by the infant at his option.[39] The object of the law is merely to protect the infant, and this object is amply secured by not allowing the contract to be enforced against him during his infancy, and allowing him to repudiate it on attaining his majority. Moreover, such a distinction must necessarily be arbitrary and doubtful, for it must always be difficult, if not impossible, to say whether a particular contract may not possibly be beneficial. It is better to allow the infant to decide this question for himself when he becomes of age.[40]

Valid Contracts—Quasi Contracts

Quasi contracts, or so called contracts created by law because of a legal duty on the part of the person bound, are as binding on an infant as on an adult.[41] The common law creates, as an incident to marriage, a duty on the part of the husband to pay the antenuptial debts of the wife, and this liability is imposed on infant as well as adult husbands.[42] The liability of an infant for necessaries furnished him is quasi contractual.[43]

Same—Contracts Authorized by Law

The rule that contracts of infants are voidable does not apply to contracts entered into by them under authority or direction of a

[39] Henry v. Root, 33 N. Y. 526; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; LEMMON v. BEEMAN, 45 Ohio St. 505, 15 N. E. 476, Throckmorton Cas. Contracts, 140; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; COLE v. PENNOYER, 14 Ill. 158, Throckmorton Cas. Contracts, 131; Patchin v. Cromach, 13 Vt. 330; Bozeman v. Browning, 31 Ark. 364; Weaver v. Jones, 24 Ala. 420; Ridgeley v. Crandall, 4 Md. 435; McDonald v. Sargent, 171 Mass. 492, 51 N. E. 17; Union Cent. Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644; Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 655. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[40] Pol. Cont. 52; 1 Pars. Cont. 244.

[41] Bish. Cont. § 906.

[42] Roach v. Quick, 9 Wend. (N. Y.) 238; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258; Butler v. Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Mitchinson v. Hewson, 7 Term R. 348; Nicholson v. Wilborn, 13 Ga. 467; Anderson v. Smith, 33 Md. 465. *See "Infants," Dec. Dig. (Key-No.) §§ 10, 50; Cent. Dig. §§ 11, 114–127.*

[43] Post, p. 199.

statute or of the common law. For instance, a voluntary assignment of his property by an infant debtor imprisoned for debt, made under a statute allowing "every person" to make such an assignment, has been held valid and binding on him, notwithstanding his infancy.[44] So, also, where an infant executed a bond for the support of his bastard child, in pursuance of a statute, it was held that the statute applied to infants, and that the bond was valid;[45] and a contract of enlistment in the army by an infant has been held valid.[46]

It should be mentioned that in some jurisdictions the court is authorized by statute to remove the disabilities of infants in particular cases.[47] And in some states it is provided by statute that if an infant, by permission of his parent or guardian, or by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound by all contracts connected with such trade, profession, or business.[48] So, in at least one state, an infant of a certain age is authorized by statute to make a valid contract of life insurance.[49]

Same—Contract in Performance of Legal Obligation

Nor does the rule apply where, by his contract, an infant has only done that which he was bound by law to do and could have been compelled to do. In such a case the contract is valid, and he

[44] People v. Mullin, 25 Wend. (N. Y.) 698. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[45] People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272; and see McCall v. Parker, 13 Metc. (Mass.) 372, 46 Am. Dec. 735; Bordentown Tp. v. Wallace, 50 N. J. Law, 13, 11 Atl. 267; Gavin v. Burton, 8 Ind. 69; Stowers v. Hollis, 83 Ky. 544. An infant's recognizance for appearance at court is binding. State v. Weatherwax, 12 Kan. 463; Dial v. Wood, 9 Baxt. (Tenn.) 296. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[46] United States v. Bainbridge, 1 Mason, 71, Fed. Cas. No. 14,497; Commonwealth v. Murray, 4 Bin. (Pa.) 487, 5 Am. Dec. 412; United States v. Blakeney, 3 Grat. (Va.) 405; In re Higgins, 16 Wis. 351; In re Hearn (D. C.) 32 Fed. 141. At common law an enlistment was not voidable by the infant or his parent. Morrissey v. Perry, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. *See "Army and Navy," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 45–50.*

[47] See Doles v. Hilton, 48 Ark. 305, 3 S. W. 193; Brown v. Wheelock, 75 Tex. 385, 12 S. W. 111, 841; McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312; Emancipation of Pochelu, 41 La. Ann. 331, 6 South. 541; Succession of Gaines, 42 La. Ann. 699, 7 South. 788. *See "Infants," Dec. Dig. (Key-No.) § 11; Cent. Dig. § 12.*

[48] Wickham v. Torley, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57. *See "Infants," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 98–110.*

[49] Hamm v. Prudential Ins. Co. of America, 137 App. Div. 504, 122 N. Y. Supp. 35 (age 15). *See "Infants," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 98–110.*

cannot avoid it.[50] Under this rule, a conveyance of land by an infant, which he could have been compelled in equity to make, is binding on him. Where, for instance, a father purchased land, and took the title in the name of his son, and the son afterwards during his minority conveyed it to a purchaser from his father, the conveyance was held to be binding on the ground that he merely parted with the naked title, and only did that which a court of equity would have compelled him to do.[51] In the leading case on this point an infant mortgagee had, on payment of the mortgage debt to the persons entitled to receive it, made a reconveyance of the land, and the court held that, as this was an act which by law he could have been compelled to perform, his voluntary performance of it was binding, notwithstanding his infancy.[52]

It is said in a New York case: "When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation. If this be not a general rule, it is at least one of pretty wide application." [53]

Same—Executed Contract

In some jurisdictions it is held that, if the contract is so far executed that the infant has received the consideration, he cannot repudiate the contract, and recover what he has paid, or for what he has done, unless he can and does place the other party in statu quo. This doctrine, as we shall see, is not generally accepted in cases where the consideration cannot be returned.[54]

[50] Co. Litt. 172a; 2 Kent, Comm. 242; Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345; Prouty v. Edgar, 6 Iowa, 353; Jones v. Brewer, 1 Pick. (Mass.) 314; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88; Trader v. Jarvis, 23 W. Va. 100; Nordholt v. Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; Starr v. Wright, 20 Ohio St. 97. A voluntary equal partition by an infant, since he could be compelled to make it, is valid. Vavington v. Clarke, 2 Pen. & W. (Pa.) 115, 21 Am. Dec. 432; Cocks v. Simmons, 57 Miss. 183. So, also, a contract by a minor with the mother of his bastard child to support it is binding. Stowers v. Hollis, 83 Ky. 544; Gavin v. Burton, 8 Ind. 69. And see note 45, supra. So a note given by an infant in settlement of his liability for a tort. Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519. *See "Infants," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 98, 99.*

[51] Elliott v. Horn, 10 Ala. 348, 44 Am. Dec. 488. *See "Infants," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 98–110.*

[52] Zouch v. Parsons, 3 Burrows, 1801. *See "Infants," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 98–110.*

[53] People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272. *See "Infants," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 98, 99.*

[54] Post, p. 215.

Void Contracts

As already stated, some courts still hold that contracts manifestly and without doubt prejudicial to the infant are void.[55] Among the contracts which have been held void upon this ground may be mentioned conveyances of land without consideration,[56] contracts of suretyship,[57] and obligations with a penalty.[58] This, however, is no longer the prevailing doctrine.

The rule is generally recognized that contracts entered into on behalf of an infant by an agent acting under a power of attorney from him are void, at least where authority to make the particular contract could be given by an adult only by power of attorney.[59]

Voidable Contracts

Under the prevailing doctrine that the contracts of an infant are voidable, and not void, contrary to the decisions mentioned in the preceding paragraph, some courts have held contracts of suretyship,[60] and bonds with a penalty,[61] merely voidable. Probably all courts regard as merely voidable purchases or sales and conveyances of real or personal property, including mortgages, for a consideration,[62] partnership agreements,[63] agreements to render services,[64]

[55] Ante, p. 186. For a collection of cases on the question when a contract by an infant is to be held void and when merely voidable, see Ewell, Lead. Cas. 30–34, 44–46, 52–55. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[56] Robinson v. Coulter, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. Rep. 708. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[57] Maples v. Wightman, 4 Conn. 376, 10 Am. Dec. 149. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[58] Fisher v. Mowbray, 8 East, 330; Baylis v. Dinely, 3 Maule & S. 477. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[59] Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756. And see post, p. 191. *See "Infants," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 5, 7.*

[60] Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Williams v. Harrison, 11 S. C. 412; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[61] Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Weaver v. Jones, 24 Ala. 420; Reed v. Lane, 61 Vt. 481, 17 Atl. 796. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[62] COLE v. PENNOYER, 14 Ill. 158, Throckmorton Cas. Contracts, 131; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800; Zouch v. Parsons, 3 Burrows, 1794; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Dixon v. Merritt, 21 Minn. 196; Hastings v. Dollarhide, 24 Cal. 195; Logan v. Gardner, 136 Pa. 588, 20 Atl. 625, 20 Am. St. Rep. 939; French v. McAndrew, 61 Miss. 187; Henry v. Root, 33 N. Y. 526; Callis v. Day, 38 Wis. 643; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[63] Dunton v. Brown, 31 Mich. 182. *See "Infants," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 130–134.*

[64] Vent v. Osgood, 19 Pick. (Mass.) 572; Clark v. Goddard, 39 Ala. 164, 84

promissory notes,[65] indorsement of a promissory note,[66] and the like.[67]

Appointment of Agent

It is very generally laid down, even by courts which do not recognize the old doctrine as to void and voidable contracts, that an infant cannot appoint an agent or attorney, and that such appointment, and consequently all acts and contracts of the agent thereunder, are void,[68] subject to an exception where the appointment is to do an act to the infant's advantage, as to receive seisin.[69] It

Am. Dec. 777; Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662. And see post, p. 219. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[65] Goodsell v. Myers, 3 Wend. (N. Y.) 479; Fetrow v. Wiseman, 40 Ind. 148; Wamsley v. Lindenberger, 2 Rand. (Va.) 478; Earle v. Reed, 10 Metc. (Mass.) 389; Minock v. Shortridge, 21 Mich. 314. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[66] Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Willis v. Twambly, 13 Mass. 204; Frazier v. Massey, 14 Ind. 382; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[67] Lease by or to infant. Zouch v. Parsons, 3 Burrows, 1794; Griffith v. Schwenderman, 27 Mo. 412. Submission to arbitration. Jones v. Bank, 8 N. Y. 228; Barnaby v. Barnaby, 1 Pick. (Mass.) 221. Settlement of disputed boundary. Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660. Compromise of action or claim. Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88. An infant's promise to marry is voidable at his or her option. Holt v. Ward Clarencieux, 2 Strange, 937, Ewell, Lead. Cas. 50; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Warwick v. Cooper, 5 Sneed (Tenn.) 659. And it has been held that a statute providing that persons under the age of 21 years "may contract and be joined in marriage" does not remove an infant's disability in this respect, so as to render him liable for breach of promise to marry. McConkey v. Barnes, 42 Ill. App. 511. *See "Infants," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 99–110.*

[68] Saunderson v. Marr, 1 H. Bl. 75; Doe v. Roberts, 16 M. & W. 778; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Bool v. Mix, 17 Wend. (N. Y.) 120, 31 Am. Dec. 285; Bennett v. Davis, 6 Cow. (N. Y.) 393; Knox v. Flack, 22 Pa. 337; Waples v. Hastings, 3 Har. (Del.) 403; Wainwright v. Wilkinson, 62 Md. 146; Philpot v. Bingham, 55 Ala. 439; Pyle v. Cravens, 4 Litt. (Ky.) 17; Lawrence's Lessee v. McArter, 10 Ohio, 37; Armitage v. Widoe, 36 Mich. 124; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Wambole v. Foote, 2 Dak. 1, 2 N. W. 239. See, also, Bartholomew v. Dighton, Cro. Eliz. 424; Whittingham's Case, 8 Co. 42b; Dexter v. Hall, 15 Wall. 9, 25, 21 L. Ed. 73; Tucker v. Moreland, 10 Pet. 58, 68, 9 L. Ed. 345; Flexner v. Dickerson, 72 Ala. 318; COLE v. PENNOYER, 14 Ill. 158, Throckmorton Cas. Contracts, 131; Fetrow v. Wiseman, 40 Ind. 148, 155; Burns v. Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268. *See "Infants," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 5, 7.*

[69] Zouch v. Parsons, 3 Burr. 1794, 1805, 1808. See Duvall v. Graves, 7 Bush (Ky.) 461. *See "Infants," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 5, 7.*

is noticeable, however, that nearly all the cases which lay down this rule are cases involving warrants of attorney to confess judgment and powers of attorney to execute a deed; and while as to these the rule appears to be firmly established, the tendency of the later decisions is to confine the rule to such cases, and in other cases to hold an infant's appointment of an agent and the acts and contracts made under it as voidable, and not void.[70]

SAME—LIABILITY FOR NECESSARIES

95. An infant is liable for the reasonable value of necessaries furnished him.

96. What are necessaries will depend upon the particular circumstances. The term includes whatever is reasonably needed for his subsistence, health, comfort, or education, taking into consideration his age, state, and condition in life. The following rules may be stated:

(a) The things furnished must concern his person, and not his estate.

(b) He is not liable for money borrowed, and expended for necessaries, unless the lender sees that it is so expended.

(c) An infant is liable for necessaries furnished his wife, and, in some jurisdictions, his children.

(d) Persons supplying an infant act at their peril, and cannot recover if the actual circumstances were such that the things furnished were not necessaries.

97. The liability of an infant for necessaries is not contractual, but quasi contractual, and his express contract for necessaries is voidable; but in some jurisdictions a recovery to the extent of their reasonable value is allowed in an action upon the express contract.

Among the contracts which are manifestly for the benefit of an infant, and hence binding, it is frequently said are his contracts for necessaries.[71] The obligation of an infant to pay for necessaries

[70] Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Welch v. Welch, 103 Mass. 562; Moley v. Brine, 120 Mass. 324; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446, per Holmes, J.; Hardy v. Waters, 38 Me. 450; Towle v. Dresser, 73 Me. 252; Patterson v. Lippincott, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; Hastings v. Dollarhide, 24 Cal. 195; Coursolle v. Weyerhauser, 69 Minn. 328, 72 N. W. 697. See Tiffany, Ag. 94. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. § 137.*

[71] McConnell v. McConnell, 75 N. H. 385, 74 Atl. 875. And see post, p. 199. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

furnished to him is, however, quasi contractual, rather than contractual. This is shown by the rule that, while he is liable for necessaries actually furnished, he is not liable on an executory contract for necessaries,[72] and by the further fact that he is liable to pay, not the price, but the reasonable value, of the necessaries.[73]

What are Necessaries—In General

Lord Coke has said that an infant's necessaries are "his necessary meat, drinke, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." [74] Under this rule necessaries will include whatever is reasonably needed for the infant's subsistence, such as food and lodging;[75] for his health, such as medicine, and services of a physician or nurse in case of sickness;[76] for his comfort,[77] and for his education.[78] The term is not limited to what is necessary to the actual support of life, but extends "to articles fit to maintain the particular person in the state, station, and degree

[72] Wallin v. Highland Park Co., 127 Iowa, 131, 102 N. W. 839, 4 Ann. Cas. 421; Jones v. Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[73] Post, p. 644.

[74] Co. Litt. 172a. For a good discussion of the law in regard to necessaries, see Ryder v. Wombwell, L. R. 3 Exch. 95. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[75] Barnes v. Barnes, 50 Conn. 572; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274. Dinners supplied to a student at private rooms at a university, prima facie not necessaries. Brooker v. Scott, 11 Mees. & W. 67; Wharton v. McKenzie, 5 Q. B. 606. Hotel bill. Watson v. Cross, 2 Duv. (Ky.) 147. Dwelling house not a necessary. Allen v. Lardner, 78 Hun, 603, 29 N. Y. Supp. 213. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[76] Gibbs v. Poplar Bluff Light & Power Co., 142 Mo. App. 19, 125 S. W. 840; Glover & Co. v. Ott's Adm'r, 1 McCord (S. C.) 572; Werner's Appeal, 91 Pa. 222. And see Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371; Wailing v. Toll, 9 Johns. (N. Y.) 141. A horse may be necessary for health, Hart v. Prater, 1 Jur. 623; Harrison v. Fane, 1 Man. & G. 550; but not if for pleasure, note 85, infra. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[77] Dentist's services. Strong v. Foote, 42 Conn. 203. An infant is liable for reasonable attorney's fees for defending him in a criminal prosecution. Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160. And see Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Crafts v. Carr, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; Wedding outfit. Jordan v. Coffield, 70 N. C. 110; Sams v. Stockton, 14 B. Mon. (Ky.) 232. Clothing. Mackerell v. Batchelor, Cro. Eliz. 583; Glover & Co. v. Ott's Adm'r, 1 McCord (S. C.) 572. But not for an unnecessary supply of clothing. Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Burghart v. Angerstein, 6 Car. & P. 690. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[78] See post, p. 194.

in life in which he is," so that things may be necessary for one person which would not be necessary for another in a different station in life.[79]

The construction of the general rule is well illustrated in its application to education. Thus, a common-school education is conceded to be a necessary as essential to the transaction of ordinary business and to the intelligent discharge of civil, political, and religious duties.[80] While under exceptional circumstances of wealth or station in society a college education may be a necessary, yet the great majority of persons pass through life without it, and it has been held that under ordinary circumstances it is not a necessary.[81] Whether or not a technical or professional education is a necessary depends upon the facts and circumstances of the particular case.[82]

[79] Peters v. Fleming, 6 Mees. & W. 46; Ewell, Lead. Cas. 56; Ryder v. Wombwell, L. R. 4 Exch. 32; McKANNA v. MERRY, 61 Ill. 177, Throckmorton Cas. Contracts, 135; Breed v. Judd, 1 Gray (Mass.) 455; Squier v. Hydliff, 9 Mich. 274; Wilhelm v. Hardman, 13 Md. 144; Jordan v. Coffield, 70 N. C. 110; Nicholson v. Spencer, 11 Ga. 610; Mauldin v. Southern Shorthand & Business University, 126 Ga. 681, 55 S. E. 922, 8 Ann. Cas. 130 [quot. Clark on Contracts (2d Ed.) 156]. Board of four horses for six months, the principal use of which was in the business of an infant as a hackman, though the horses were occasionally used to carry his family out to drive, was held not necessary. Merriam v. Cunningham, 11 Cush. (Mass.) 40. Livery for the servant of an infant officer in the army was held a necessary. Hand v. Slaney, 8 Term R. 578. And see Coates v. Wilson, 5 Esp. 152. But not cockades ordered for his soldiers. Hand v. Slaney, supra. "Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed." Chapple v. Cooper, 13 Mees. & W. 252. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[80] Middlebury College v. Chandler, 16 Vt. 686, 42 Am. Dec. 537. Board bill contracted by an infant to enable him to attend school is a necessary expense. Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780. *See "Infants," Dec. Dig. (Key-No.) §§ 50, 53; Cent. Dig. §§ 114, 116.*

[81] Middlebury College v. Chandler, supra; Pickering v. Gunning, W. Jones, 182. *See "Infants," Dec. Dig. (Key-No.) §§ 50, 53; Cent. Dig. §§ 114, 116.*

[82] Bouchell v. Clary, 3 Brev. (S C.) 194; Mauldin v. Southern Shorthand & Business University, 126 Ga. 681, 55 S. E. 922, 8 Ann. Cas. 130 (course in stenography). Thus, under certain circumstances, a medical education has been held not to be necessary, Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574; while under other circumstances, it has been conceded that a course in pharmacy is necessary. Wallin v. Highland Park Co., 127 Iowa, 131, 102 N. W. 839, 4 Ann. Cas. 421. Whether preliminary education in arithmetic, algebra, geometry, and mechanical drawing as part of a correspondence course in electricity was necessary to an infant who had spent two years in a high school was a question of fact for the jury. International Text-Book Co. v. Doran, 80 Conn. 307, 68 Atl. 253. *See "Infants," Dec. Dig. (Key-No.) §§ 50, 53; Cent. Dig. § 114.*

While, therefore, as a general rule, the question must depend on the circumstances of each particular case, there are, of course, some things which are obviously incapable of being deemed necessaries. A wild animal or a steam roller, or a railroad engine, cannot, under any circumstances, be deemed such. And the same has been held of life insurance.[83]

Nor can things intended for ornament, and not for use,[84] or merely for pleasure,[85] be regarded as necessary. Again, things may be of a useful or necessary character, but the quality or quantity supplied may take them out of the character of necessaries.[86] Elementary text-books might be necessary to a law student; but not a rare edition, nor a great number of copies of a single book. Things necessary to a person in one station of life might not be necessary to a person in a different station. Again, things not usually necessary may become so from the circumstances of the infant. Medical attendance and expensive articles of food may ordinarily be dispensed with, but may become necessary in case of ill health.

Things with which an infant is already sufficiently supplied are not necessary.[87] An infant residing under the care of his father or

[83] Simpson v. Prudential Ins. Co. of America, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560. *See "Infants," Dec. Dig.* (*Key-No.*) § *50; Cent. Dig.* §§ *115–127.*

[84] Peters v. Fleming, 6 Mees. & W. 42; McKANNA v. MERRY, 61 Ill. 179, Throckmorton Cas. Contracts, 135. *See "Infants," Dec. Dig.* (*Key-No.*) §§ *50, 53; Cent. Dig.* §§ *114, 116.*

[85] McKANNA v. MERRY, 61 Ill. 179, Throckmorton Cas. Contracts, 135; Glover v. Ott's Adm'r, 1 McCord (S. C.) 572; Beeler v. Young, 1 Bibb (Ky.) 519. Horse, carriage, or bicycle not ordinarily a necessity. House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; Miller v. Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; Beeler v. Young, 1 Bibb (Ky.) 519; Howard v. Simpkins, 70 Ga. 322; Heffington v. Jackson, 43 Tex. Civ. App. 560, 96 S. W. 108 (buggy and harness). A horse, however, may be necessary for health. Note 76, supra. Money furnished to enable an infant to take a necessary trip may be necessary, but not to take a trip for pleasure. Breed v. Judd, 1 Gray (Mass.) 455; McKANNA v. MERRY, supra. Tobacco is prima facie not necessary. Bryant v. Richardson, 12 Jur. (N. S.) 300. *See "Infants;" Dec. Dig.* (*Key-No.*) §§ *50, 53; Cent. Dig.* §§ *114, 116.*

[86] Ryder v. Wombwell, L. R. 3 Exch. 95; Burghart v. Angerstein, 6 Car. & P. 690; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Nicholson v. Spencer, 11 Ga. 610. *See "Infants," Dec. Dig.* (*Key-No.*) § *50; Cent. Dig.* §§ *114–127.*

[87] Barnes v. Toye, 13 Q. B. Div. 410; Davis v. Caldwell, 12 Cush. (Mass.) 512; Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274; McKANNA v. MERRY, 61 Ill. 180, Throckmorton Cas. Contracts, 135; Nicholson v. Wilborn, 13 Ga. 467; Bainbridge v. Pickering, 2 W. Bl. 1325; Burghart v. Angerstein, 6 Car. & P. 690; Perrin

guardian, and supported by him, is not liable even for necessaries; and it even seems that this is so notwithstanding the poverty of his father.[88] It has been held that the fact that an infant is abundantly supplied with money, so that he can purchase necessaries for cash if he chooses, is not equivalent to being supplied, and he will nevertheless be liable for necessaries bought on credit; but there is authority to the contrary.[89]

Must Concern His Person

The things furnished, to come within the term "necessaries," must concern the person of the infant, and not his estate. An infant, therefore, is not bound by contracts for things necessary to carry on a business into which he enters.[90] He is not liable for materials purchased and used for the erection of a house on his land,[91] and it has even been held that he is not liable for the expense of repairing his dwelling house on a contract made by him therefor, although the repairs may have been necessary to prevent immedi-

v. Wilson, 10 Mo. 451; Guthrie v. Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681; note 86, supra. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[88] Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371; Bainbridge v. Pickering, 2 W. Bl. 1325; Ewell, Lead. Cas. 55; Wailing v. Toll, 9 Johns. (N. Y.) 141; Guthrie v. Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681; Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449; Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; Perrin v. Wilson, 10 Mo. 451; Trainer v. Trumbull, 141 Mass. 530, 6 N. E. 761; Jones v. Colvin, 1 McMul. (S. C.) 14; Elrod v. Myers, 2 Head (Tenn.) 83; Kraker v. Byram, 13 Rich. Law (S. C.) 163; Freeman v. Bridger, 49 N. C. 4, 67 Am. Dec. 258; Hull's Assignees v. Connolly, 3 McCord (S. C.) 6, 15 Am. Dec. 612. A complaint, however, is not demurrable for failure to allege refusal of the parent or guardian to supply the infant, or that there was no person who could and would support him. Goodman v. Alexander, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[89] Burghart v. Hall, 4 Mees. & W. 727. But see Rivers v. Greggs, 5 Rich. Eq. (S. C.) 274; Barnes v. Toye, 13 Q. B. Div. 410. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[90] House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; Mason v. Wright, 13 Metc. (Mass.) 306; Stern v. Meikleham, 56 Hun, 475, 10 N. Y. Supp. 216; Paul v. Smith, 41 Mo. App. 275; Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449; Merriam v. Cunningham, 11 Cush. (Mass.) 40; State v. Howard, 88 N. C. 650; Wood v. Losey, 50 Mich. 475, 15 N. W. 557; Dilk v. Keighley, 2 Esp. 480; Wallace v Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777 (even though he derives his living from the business). *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[91] Wornock v. Loar (Ky.) 11 S. W. 438; Freeman v. Bridger, 49 N. C. 1, 67 Am. Dec. 258; Price v. Jennings, 62 Ind. 111. Nor is his property subject to a mechanic's lien therefor. Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

ate and serious injury to the house.[92] So he is not liable on a contract of fire insurance.[93] While an infant is liable for a reasonable attorney's fee for services rendered in connection with his personal relief, protection, or liberty,[94] yet on principle and by the weight of authority he is not liable for services rendered by an attorney in connection with his property or estate.[95]

Money

Money, as such, is not regarded as necessary. "An infant," it was said in a New York case, "is not answerable for money borrowed, though expended by him for necessaries; nor for money borrowed to buy necessaries, unless it was actually so applied. And perhaps the infant is not answerable in that case, unless the lender either lays out the money himself, or sees it laid out, for necessaries. But where this is done the infant is answerable for the money the same as he would have been for the necessaries had they been directly furnished by the lender." [96]

[92] Phillips v. Lloyd, 18 R. I. 99, 25 Atl. 909; Tupper v. Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; Wallis v. Bardwell, 126 Mass. 366; West v. Gregg's Adm'r, 1 Grant Cas. (Pa.) 53. Nor for a loan of money to pay off incumbrances. Bicknell v. Bicknell, 111 Mass. 265; Magee v. Welsh, 18 Cal. 155. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[93] New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[94] Crafts v. Carr, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721 and note; Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176; Sutton v. Heinzle, 84 Kan. 756, 115 Pac. 560, 34 L. R. A. (N. S.) 238. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[95] Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; Phelps v. Worcester, 11 N. H. 51; Dillon v. Bowles, 77 Mo. 603; McIsaac v. Adams, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321, 5 Ann. Cas. 729 (in which it is said, per Knowlton, C. J.: "Ordinarily rights of property are to be protected by a guardian, and not left to the care of the minor himself or to the irresponsible action of third persons"). Contra: Epperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837. And see Owens v. Gunther, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130 and note. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[96] Randall v. Sweet, 1 Denio (N. Y.) 460. And see Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780; Swift v. Bennett, 10 Cush. (Mass.) 436; Genereux v. Sibley, 18 R. I. 43, 25 Atl. 345; Price v. Sanders, 60 Ind. 310; Haine's Adm'r v. Tarrant, 2 Hill (S. C.) 400; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Beeler v. Young, 1 Bibb (Ky.) 519; Earle v. Peale, 1 Salk. 387. He may, however, be held liable in equity for money borrowed and expended by him for necessaries. Price v. Sanders, 60 Ind. 310; Watson v. Cross, 2 Duv. (Ky.) 147; Hickman v. Hall's Adm'rs, 5 Litt. (Ky.) 338; Beeler v. Young, 1 Bibb (Ky.) 521. *See "Infants," Dec. Dig. (Key-No.) § 51; Cent. Dig. § 111.*

Necessaries to Wife and Children

A man is bound by law to support and care for his wife; and an infant is therefore liable for necessaries furnished her.[97] And he has also been held liable for necessaries furnished to his child.[98] There is, however, authority for the contrary view as to children.[99]

Persons Supplying Infant Act at Their Peril

Whether things supplied to an infant were necessaries is to be determined by the infant's actual circumstances. If a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class, not knowing that the infant is already sufficiently supplied, he does so at his peril.[1]

Question of Law or Fact

Difficulty has arisen in determining the respective provinces of the court and jury in ascertaining whether things supplied to an infant were necessaries. It is frequently stated in the American cases that the question whether articles come within the class of necessaries is for the court, and that the question whether they were necessaries in fact is for the jury.[2] In England it has been settled that the question whether the articles were necessaries is one of fact, and therefore for the jury; but that, like other questions of

[97] Cantine v. Phillips' Adm'r, 5 Har. (Del.) 428; Price v. Sanders, 60 Ind. 315; Chapman v. Hughes, 61 Miss. 339; Chapple v. Cooper, 13 Mees. & W. 252, 259; Turner v. Frisby, 1 Strange, 168; People v. Moores, 4 Denio (N. Y.) 520, 47 Am. Dec. 272. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[98] Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Ex parte Ryder, 11 Paige (N. Y.) 185, 42 Am. Dec. 109; post, p. 645. And see McConnell v. McConnell, 75 N. H. 385, 74 Atl. 875, holding a female infant liable for necessaries furnished herself and child. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[99] Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499. See Tiffany, Pers. & Dom. Rel. 230, 269. *See "Parent and Child," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 36.*

[1] Brayshaw v. Eaton, 7 Scott, at page 187; Barnes v. Toye, 13 Q. B. Div. 410; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; Davis v. Caldwell, 12 Cush. (Mass.) 513; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274; Monumental Bldg. Ass'n v. Herman, 33 Md. 131; Perrin v. Wilson, 10 Mo. 451; Nicholson v. Spencer, 11 Ga. 607. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127.*

[2] Tupper v. Cadwell, 12 Metc. (Mass.) 559, 563, 46 Am. Dec. 704; Merriam v. Cunningham, 11 Cush. (Mass.) 40, 44; Bent v. Manning, 10 Vt. 225; Stanton v. Willson, 3 Day (Conn.) 37, 56, 3 Am. Dec. 255; Glover v. Ott's Adm'r, 1 McCord (S. C.) 572; Beeler v. Young, 1 Bibb (Ky.) 519; Grace v. Hale, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; McKANNA v. MERRY, 61 Ill. 177, Throckmorton, Cas. Contracts, 135. *See "Infants," Dec. Dig. (Key-No.) § 102; Cent. Dig. § 127.*

tact, it should not be left to the jury unless there is evidence on which they can reasonably find in the affirmative.[3] Practically, there is little difference in the two rules, for the cases involving articles intrinsically incapable of being necessaries are rare, and the question in most cases depends on the particular circumstances.

Express Contract for Necessaries

The obligation of an infant to pay for necessaries being quasi contractual, he is liable without an express contract.[4] The law creates an obligation on his part to pay what the necessaries are reasonably worth, but his express contract is voidable.[5] If he has given his note or other negotiable instrument in payment, the seller can recover no more than the reasonable value, and on principle, in such a case, there can be no recovery on the note.[6] In many jurisdictions, however, anomalously, an action may be maintained upon the contract, but the real value will be inquired into, and the recovery limited to that amount.[7]

[3] Ryder v. Wombwell, L. R. 3 Exch. 93. See, also, Peters v. Fleming, 6 M. & W. 42; Wharton v. Mackenzie, 5 Q. B. 606; Davis v. Caldwell, 12 Cush. (Mass.) 512, per Shaw, C. J.; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Mohney v. Evans, 51 Pa. 80. *See "Infants," Dec. Dig. (Key-No.) § 102; Cent. Dig. § 127.*

[4] Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; Trainer v. Trumbull, 141 Mass. 530, 6 N. E. 761; Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. See Keener, Quasi Contracts, 20. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114, 125.*

[5] Earle v. Reed, 10 Metc. (Mass.) 387; Davis v. Gay, 141 Mass. 531, 6 N. E. 549; Beeler v. Young, 1 Bibb (Ky.) 519; Parsons v. Keys, 43 Tex. 557; Hyer v. Hyatt, 3 Cranch, C. C. 276, Fed. Cas. No. 6,977; Dubose v. Wheddon, 4 McCord (S. C.) 221; Locke v. Smith, 41 N. H. 346; International Text-Book Co. v. McKone, 133 Wis. 200, 113 N. W. 438. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114, 125.*

[6] Swasey v. Vanderheyden's Adm'r, 10 Johns. (N. Y.) 33; Fenton v. White, 4 N. J. Law, 111; McMinn v. Richmonds, 6 Yerg. (Tenn.) 9; Bouchell v. Clary, 3 Brev. (S. C.) 194; McCrillis v. How, 3 N. H. 348; Henderson v. Fox, 5 Ind. 489; Morton v. Steward, 5 Ill. App. 533. *See "Infants," Dec. Dig. (Key-No.) §§ 50, 52; Cent. Dig. §§ 114, 125, 128.*

[7] Earle v. Reed, 10 Metc. (Mass.) 387; Bradley v. Pratt, 23 Vt. 378; Dubose v. Wheddon, 4 McCord (S. C.) 221; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Aaron v. Harley, 6 Rich. Law (S. C.) 26; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Guthrie v. Morris, 22 Ark. 411; Trainer v. Trumbull, 141 Mass. 530, 6 N. E. 761. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114, 125.*

SAME—RATIFICATION AND AVOIDANCE

98. Where the contract of an infant is voidable, he may ratify it, and thereby render it binding; or he may disaffirm it, and thereby render it void.

Where the contract of an infant is voidable only, he may ratify it on attaining his majority, and thereby assume the rights and liabilities arising from it; or he may, before ratification, but not afterwards, disaffirm or repudiate it, and thereby escape any liability under it. The reader will remember that such a ratification is an illustration of the class of cases in which a past consideration will support a subsequent promise.[8] Some contracts are valid unless they are rescinded. Other contracts are invalid unless they are ratified.

When Disaffirmance Necessary

The rule seems to be that, where an infant acquires an interest in permanent property, to which obligations attach, or enters into a contract which involves continuous rights and duties, benefits and liabilities, and takes benefits under the contract, he may become bound, unless he expressly disaffirms the contract.[9]

As illustrating this rule, an infant lessee, who occupies the premises after reaching his majority, is liable for arrears of rent which accrued during his minority.[10] Persons who have become possessed of shares in a corporation during infancy, if they hold them after they reach their majority, are liable for calls which accrued while they were infants.[11] An infant may become a partner, and at com-

[8] Ante, p. 174.

[9] Clemmer v. Price (Tex. Civ. App.) 125 S. W. 604. Some cases declare that, while an infant's executory contracts are inoperative until ratified, his executed contracts are good until rescinded. Minock v. Shortridge, 21 Mich. 304; Edgerly v. Shaw, 25 N. H. 514, 57 Am. Dec. 349; Beardsley v. Hotchkiss, 96 N. Y. 201. But the cases are in conflict, as is shown by the different views entertained as to whether a conveyance is ratified by silence and acquiescence after majority. Post, p. 210. On the other hand, if an infant purchases property and retains it for an unreasonable time after majority without disaffirmance, he is generally held to have ratified. Boyden v. Boyden, 9 Metc. (Mass.) 519; Ellis v. Alford, 64 Miss. 8, 1 South. 155; post, p. 209. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[10] Rolle, Abr. 731.

[11] Northwestern R. Co. v. McMichael, 5 Exch. 114. It was said in this case: "They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obli-

mon law may be entitled to benefits, though not liable for debts, arising from the partnership during his infancy; though equity would not allow him to claim the benefits without being charged with the losses. Unless, on attainment of majority, there is an express rescission and disclaimer of the partnership, the infant will be liable for losses accruing after he became of age. By holding himself out as a partner he contracts a continual obligation, and that obligation remains until he puts an end to it by a disclaimer.[12] And so, where shares in a corporation were assigned to an infant who attained his majority some months before an order was made for winding up the company, it was held that, in the absence of any disclaimer of the shares, he was liable as a contributory.[13]

When Ratification is Necessary

The cases of which we have just been speaking, and which require an express disclaimer to avoid the effect of the contract, are all cases in which an interest was acquired in permanent property to which liabilities attached, or in which the contract entered into by the infant involved continuous rights, duties, and liabilities. If, on the other hand, the promise of the infant is to perform some isolated act, or if the contract is wholly executory, it will not be binding on him unless he expressly ratifies it on coming of age.[14] As we have seen, if a person who has entered into a partnership during his minority fails to disaffirm the agreement after reaching his majority, and so holds himself out as a partner, he will be liable for debts of the firm contracted after he became of age; but he will not be liable for debts of the firm contracted during his minority, unless he ratifies them.[15] Some courts hold that his ratification of the partnership agreement is a ratification of debts of the firm contract-

gations attached to it which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, * * * unless they have elected to waive or disagree the purchase altogether, either during infancy or at full age, at either of which times it is competent for an infant to do so." *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[12] Goode v. Harrison, 5 Barn. & Ald. 159; Miller v. Sims, 2 Hill (S. C.) 479. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[13] Lumsden's Case, 4 Ch. App. 31. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[14] Whitney v. Dutch, 14 Mass. 460, 7 Am. Dec. 229; Carrell v. Potter, 23 Mich. 379; Savage v. Lichlyter, 59 Ark. 1, 26 S. W. 12. See, also, post, p. 206. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[15] Tobey v. Wood, 123 Mass. 88, 25 Am. Rep. 27; Todd v. Clapp, 118 Mass. 495; Bush v. Linthicum, 59 Md. 344. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

ed during his minority,[16] and this would seem the proper doctrine; but the contrary has been held.[17]

SAME—WHO MAY AVOID CONTRACT

99. The privilege of infancy is personal to the infant, and he alone can take advantage of it during his life and sanity.

100. On his death, or if he becomes insane, his contracts may be avoided by his heirs, personal representatives, or conservator or guardian.

101. The other party to the contract, not being himself under disability, is bound if the infant chooses to hold him.

The privilege of infancy is intended to protect the infant, and during his life and sanity he alone can take advantage of it.[18] It is even held that his guardian cannot avoid his contracts for him, though there is some dictum to the contrary.[19] On his death, however, or if he becomes insane, his contracts may be avoided by his

[16] Salinas v. Bennett, 33 S. C. 285, 11 S. E. 968; Miller v. Sims, 2 Hill (S. C.) 479. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[17] Mehlhop v. Rae, 90 Iowa, 30, 57 N. W. 650; Crabtree v. May, 1 B. Mon. (Ky.) 289; Minock v. Shortridge, 21 Mich. 304. And see cases cited in note 15, supra. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148, 151.*

[18] Keane v. Boycott, 2 H. Bl. 511, Ewell's Cas. 17; Holt v. Ward Clarencieux, 2 Strange, 937; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; MANSFIELD v. GORDON, 144 Mass. 168, 10 N. E. 773, Throckmorton, Cas. Contracts, 137; Harris v. Ross, 112 Ind. 314, 13 N. E. 873; Hartness v. Thompson, 5 Johns. (N. Y.) 160; Beardsley v. Hotchkiss, 96 N. Y. 201; Baldwin v. Rosier (C. C.) 48 Fed. 810; Hooper v. Payne, 94 Ala. 223, 10 South. 431; Chambers v. Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118; Dentler v. O'Brien, 56 Ark. 49, 19 S. W. 111; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; Garner v. Cook, 30 Ind. 331; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Van Bramer v. Cooper, 2 Johns. (N. Y.) 279; Alsworth v. Cordtz, 31 Miss. 32. In an action, for instance, for enticing away a servant from plaintiff's service, the defendant cannot escape liability by showing that the servant was an infant, and was therefore not bound by his contract with the plaintiff. Keane v. Boycott, supra. The surety on a bond given by an infant, and afterwards disaffirmed by him, has been held liable. Kyger v. Sipe, 89 Va. 507, 16 S. E. 627. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

[19] See Oliver v. Houdlet, 13 Mass. 240, 7 Am. Dec. 134; Irvine's Heirs v. Crockett, 4 Bibb (Ky.) 437; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Cf. Stafford v. Roof, 9 Cow. (N. Y.) 626; post, p. 205. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

heirs,[20] his personal representatives,[21] or his guardian or conservator.[22] The reason of the rule, it has been said, extends only to them because the privilege is conferred for his sole benefit. While living, he should be the exclusive judge of that benefit, and when dead those alone should interfere who legally represent him. Could his contracts be avoided by third persons, the principle would operate, not for his, but for their, benefit; not when he chose to avail himself of his privileges, but when strangers elected to do it.[23]

The other party to the contract, not being himself under a disability to contract, cannot avoid it. He is bound if the infant chooses to hold him by ratifying the contract on becoming of age.[24] A court of equity, however, will not grant an infant specific performance of a contract by the adult.[25] Of course, those contracts which are held void, and not merely voidable, at the infant's option, are of no effect at all, and can bind neither party.

[20] Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Harvey v. Briggs, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Veal v. Fortson, 57 Tex. 487; Ferguson v. Bell's Adm'r, 17 Mo. 351; Levering v. Heighe, 2 Md. Ch. 81, 88; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 248, 19 Am. Dec. 71. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

[21] Parsons v. Hill, 8 Mo. 135; Hastings v. Dollarhide, 24 Cal. 207; Person v. Chase, 37 Vt. 650, 88 Am. Dec. 630; Jefford's Adm'r v. Ringgold, 6 Ala. 547; Hussey v. Jewett, 9 Mass. 100; Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 248, 19 Am. Dec. 71. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

[22] Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

[23] MANSFIELD v. GORDON, 144 Mass. 168, 10 N. E. 773, Throckmorton, Cas. Contracts, 137. Though ordinarily a plea of infancy is personal, a beneficiary in a policy on the infant's life may plead it in answer to the company's defense of false warranties in the application; for otherwise an infant's contract of insurance would be in effect binding on him during his minority. O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

[24] Holt v. Ward Clarencieux, 2 Strange, 937; Thompson v. Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Field v. Herrick, 101 Ill. 110. *See "Infants," Dec. Dig. (Key-No.) §§ 47, 58; Cent. Dig. § 150.*

[25] Flight v. Bolland, 4 Russ. 298. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 150.*

SAME—TIME OF AVOIDANCE

102. Executory contracts, or executed contracts relating to personalty, may be avoided by an infant either before or after attaining his majority; but conveyances of land cannot be disaffirmed during minority, though he may enter and take the profits.

103. As a rule, mere lapse of time after attaining his majority will not bar an infant's disaffirmance of his executory contract, but in a few states he is required to disaffirm within a reasonable time.

104. As a rule, executed contracts must be disaffirmed within a reasonable time after attaining majority; but in some states it is held that the right to avoid a conveyance of land is not barred by acquiescence for any period short of that prescribed by the statute of limitations.

An infant's executory contract may be avoided by him at any time, either before or after attaining his majority, by refusing to perform it; and pleading his infancy when sued for breach of the contract.[26]

In the case of executed contracts a distinction is made between contracts relating to his land and those relating to his personalty. A deed of land executed by an infant cannot be disaffirmed during his minority. He may enter on the land and take the profits until the time arrives when he has the legal capacity to affirm or disaffirm the deed; but the deed is not rendered void by the entry. It may still be affirmed after he reaches his majority.[27]

[26] Reeves, Dom. Rel. 254; RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton, Cas. Contracts, 143; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Ross P. Curtice Co. v. Kent, 89 Neb. 496, 131 N. W. 944. An infant may avoid his contracts for personal services during his minority. Vent v. Osgood, 19 Pick. (Mass.) 572; Ray v. Haines, 52 Ill. 485; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Vehue v. Pinkham, 60 Me. 142; Whitmarsh v. Hall, 3 Denio (N. Y.) 375. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 149–160.*

[27] Welch v. Bunce, 83 Ind. 382; Zouch v. Parsons, 3 Burrows, 1794; Irvine v. Irvine, 5 Minn. 61 (Gil. 44); Hastings v. Dollarhide, 24 Cal. 195; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; McCormic v. Leggett, 53 N. C. 425; Stafford v. Roof, 9 Cow. (N. Y.) 626; Baker v. Kennett, 54 Mo. 88. An infant, however, may, before attaining his majority, plead infancy in a suit to foreclose a mortgage on land. Schneider v. Stahr, 20 Mo. 269. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 41, 46, 50–63.*

The rule, however, does not apply to a sale and manual delivery of chattels by an infant. Such a contract may be avoided by him while he is still an infant.[28] In a New York case it was said: "The general rule is that an infant cannot avoid his contract, executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant, or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive. * * * Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases, and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be that, where the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately." [29]

The rule is very general, almost universal, that an infant may avoid any contract in relation to his personal property before he is of age.[30] Some courts have held that he cannot disaffirm a partnership agreement during his minority, so as to recover what he has

[28] Stafford v. Roof, 9 Cow. (N. Y.) 626; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Zouch v. Parsons, 3 Burrows, 1794; Adams v. Beall, 67 Md. 53, 8 Atl. 604, 1 Am. St. Rep. 379; Shipman v. Horton, 17 Conn. 481; Riley v. Mallory, 33 Conn. 207; Willis v. Twambly, 13 Mass. 204; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Chapin v. Shafer, 49 N. Y. 407; Towle v. Dresser, 73 Me. 252; Hoyt v. Wilkinson, 57 Vt. 404; Carpenter v. Carpenter, 45 Ind. 142; Cogley v. Cushman, 16 Minn. 397 (Gil. 354); Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 149–160.*

[29] Stafford v. Roof, supra. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 41, 46, 50–63.*

[30] See Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12 (collecting cases); RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton, Cas. Contracts, 143; Hoyt v. Wilkinson, 57 Vt. 404; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Willis v. Twambly, 13 Mass. 204; Stafford v. Roof, 9 Cow. (N. Y.) 628; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Petrie v. Williams, 68 Hun, 589, 23 N. Y. Supp. 237; Cogley v. Cushman, 16 Minn. 397 (Gil. 354); Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522. Contra: Lansing

put into the firm but must wait until he attains his majority.[21] Other courts hold the contrary, on the ground that it is a contract in relation to his personalty, and that all contracts of an infant in relation to personal property may be disaffirmed during his minority.[22]

As to whether a contract must be disaffirmed by an infant within a reasonable time after he attains his majority, the authorities are conflicting. In the case of executory contracts requiring ratification to render them binding, the right to avoid them cannot be barred by mere silence, without more. It may be otherwise where the circumstances are such as to make it the infant's duty to speak, for in such a case silence or acquiescence may amount to a ratification.[23]

In the case of conveyances of land, sales and delivery of chattels, and the like, many courts hold that the infant must disaffirm the contract within a reasonable time after he attains his majority, or be held to have ratified it, and to be barred from avoiding it.[24] Many courts, however, have held that a conveyance of land by an infant need not be disaffirmed within any period short of that prescribed by the statute of limitations, and that acquiescence for any shorter time will not bar his right to avoid it.[25]

v. Railroad Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567. And see Pippen v. Insurance Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 149–160.*

[21] Dunton v. Brown, 31 Mich. 182; Armitage v. Widoe, 36 Mich. 130; Bush v. Linthicum, 59 Md. 344 (but see Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379). *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 149–160.*

[22] Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12 (collecting cases); Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 149–160.*

[23] Ante, p. 201; post, p. 210.

[24] Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Goodnow v. Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798 (collecting the cases pro and con); Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Dolph v. Hand, 156 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25; Amey v. Cockey, 73 Md. 297, 20 Atl. 1071; Ihley v. Padgett, 27 S. C. 300, 3 S. E. 468; Sanders v. Bennett (Ky.) 1 S. W. 436; Scott v. Buchanan, 11 Humph. (Tenn.) 468; Aldrich v. Funk, 48 Hun, 367, 1 N. Y. Supp. 543; Ward v. Laverty, 19 Neb. 429, 27 N. W. 393; Thormaehlen v. Kaeppel, 86 Wis. 378, 56 N. W. 1089; Kline v. Beebe, 6 Conn. 506; Clemmer v. Price (Tex. Civ. App.) 125 S. W. 604 (conveyance of land to infant). An infant's delay of less than six months after majority in avoiding a deed of land, with knowledge that purchasers from his grantee are making improvements, does not estop him. Rundle v. Spencer, 67 Mich. 189, 34 N. W. 548. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 41, 46, 50–63, 149–160.*

[25] Drake's Lessees v. Ramsay, 5 Ohio, 251; Prout v. Wiley, 28 Mich. 164; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Sims v. Everhardt, 102 U. S. 300,

It is provided by statute in some states that an infant is bound on all his contracts unless he disaffirms them within a reasonable time.[36]

SAME—WHAT AMOUNTS TO RATIFICATION

105. In some jurisdictions, by statute, ratification of a contract by an infant must, subject to specified exceptions, be in writing, signed by him or his agent.

106. In the absence of such a provision, ratification may be by an express new promise, orally or in writing; or it may be implied from declarations or conduct clearly showing an intention to be bound.

107. The promise must be made or the acts done by the infant understandingly, but the cases are in conflict as to whether knowledge of the legal right to avoid the contract is necessary.

Writing Required by Statute

In some jurisdictions it is declared by statute that, with specified exceptions, no action shall be maintained on any contract made by an infant, unless he, or some person lawfully authorized, has ratified it in writing after he attained his majority.[37] No particular form of words is required by the statute to make a confirmation of a debt contracted by a person when an infant, and they need not amount to a direct promise to pay, but they must import an unequivocal recognition and confirmation of the previous engagement.[38]

26 L. Ed. 87; Wells v. Selxas (C. C.) 24 Fed. 82; Richardson v. Pate, 93 Ind. 423, 47 Am. Rep. 374; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Eagan v. Scully, 29 App. Div. 617, 51 N. Y. Supp. 680, affirmed 173 N. Y. 581, 65 N. E. 1116; Shipp v. McKee, 80 Miss. 741, 31 South. 197, 32 South. 281, 92 Am. St. Rep. 616. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 54, 55.*

[36] Leacox v. Griffith, 76 Iowa, 89, 40 N. W. 109; Mehlhop v. Rae, 90 Iowa, 80, 57 N. W. 650; Hegler v. Faulkner, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653 (under Nebraska statute); Johnson v. Storie, 32 Neb. 610, 49 N. W. 371. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 54, 55.*

[37] Ward v. Scherer, 96 Va. 318, 31 S. E. 518; Bird v. Swain, 79 Me. 529, 11 Atl. 421. In the absence of such ratification in writing, the sale by an infant, after coming of age, of merchandise bought by him on credit during his minority, does not render him liable for its purchase price, either in tort or contract. Lamkin & Foster v. Le Doux, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. § 139.*

[38] Ward v. Scherer, 96 Va. 318, 31 S. E. 518. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

Where No Statutory Requirement

In the absence of such a statutory provision, ratification may either be by an express new promise, made orally or in writing, or it may be implied from acts or declarations clearly showing an intention to recognize the contract, and to be bound by it. The new promise, whether in writing or oral, or evidenced by conduct, must be clear and unequivocal, and must show an intention to be bound.[39]

A mere acknowledgment of the contract, without a promise to be bound, express or implied, is not sufficient.[40] Where there is a new promise, it must be made to the other party or his agent;[41] and if it is not absolute, but conditional—as, for instance, where it is a promise to pay or otherwise perform when able—the condition must be fulfilled before any liability attaches.[42]

It has frequently been held that to render an act or promise binding as a ratification it must be performed or made with knowledge that there was in law no liability on the original contract.[43] There are many cases, however, which hold that knowledge of the law is not necessary, or, rather, must be presumed.[44]

There need be no fresh consideration for the new promise, for,

[39] Whitney v. Dutch, 14 Mass., at page 460, 7 Am. Dec. 229; Carrell v. Potter, 23 Mich. 379. And see notes 46–51, infra. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[40] THOMPSON v. LAY, 4 Pick. (Mass.) 48, 16 Am. Dec. 325, Throckmorton Cas. Contracts, 139; Ford v. Phillips, 1 Pick. (Mass.) 202; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Hale v. Gerrish, 8 N. H. 374. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[41] Goodsell v. Myers, 3 Wend. (N. Y.) 479; Bigelow v. Grannis, 2 Hill (N. Y.) 120. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[42] Everson v. Carpenter, 17 Wend. (N. Y.) 419; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; THOMPSON v. LAY, 4 Pick. (Mass.) 48, 16 Am. Dec. 325, Throckmorton Cas. Contracts, 139; Proctor v. Sears, 4 Allen (Mass.) 95. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[43] Harner v. Killing, 5 Esp. 103; Curtin v. Patton, 11 Serg. & R. (Pa.) 305; Thing v. Libbey, 16 Me. 55; Trader v. Lowe, 45 Md. 1; Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Ford v. Phillips, 1 Pick. (Mass.) 202; Reed v. Boshears, 4 Sneed (Tenn.) 118; Norris v. Vance, 3 Rich. Law (S. C.) 164; Burdett v. Williams (D. C.) 30 Fed. 697; Bresee v. Stanly, 119 N. C. 278, 25 S. E. 870. No ratification, if adult is ignorant that he was an infant when he made the contract. Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[44] Morse v. Wheeler, 4 Allen (Mass.) 570; Taft v. Sergeant, 18 Barb. (N. Y.) 321; Anderson v. Soward, 40 Ohio St. 325, 48 Am. Rep. 687; American Mortgage Co. of Scotland v. Wright, 101 Ala. 658, 14 South. 399; Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Ring v. Jamison, 66 Mo. 424; Bestor v. Hickey, 71 Conn. 181, 41 Atl. 555. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

as we have seen, this is one of the cases in which a past consideration is sufficient.[45]

Same—Implied Ratification

Unless a statute so requires, an express promise in terms is not necessary in order to constitute ratification of an obligation incurred during infancy. "Where the declarations or acts of the individual after becoming of age," said the Vermont court, "fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part, made during infancy, and intended to pay the debt then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable." [46]

The courts go much further than this, and hold substantially that any intelligent conduct by a person, after attaining his majority, inconsistent with the nonexistence of a contract, executory or executed, will, as a rule, amount to an affirmance of the contract.[47] If, for instance, an infant takes a lease, and after becoming of age recognizes it by occupying under it, or if, having given a lease, he accepts rent after becoming of age, his conduct amounts to a ratification.[48] So, also, a purchase of land or chattels by an infant is ratified if he retains and uses the property for an unreasonable time after attaining his majority, or if he sells it to a third person, or otherwise disposes of it.[49] The receipt of, or a suit to

[45] Ante, p. 174.

[46] Hatch v. Hatch's Estate, 60 Vt. 100, 13 Atl. 791. And see Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Baker v. Kennett, 54 Mo. 88; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Emmons v. Murray, 16 N. H. 385; Drake v. Wise, 36 Iowa, 476; Hale v. Gerrish, 8 N. H. 374; Middleton v. Hoge, 5 Bush (Ky.) 478 (collecting cases); Barlow v. Robinson, 174 Ill. 317, 51 N. E. 1045. See Ewell, Lead. Cas. 173–180. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[47] Henry v. Root, 33 N. Y. 526 (collecting cases). Where an infant buys land, and gives a mortgage to secure the purchase money, a sale and conveyance of the land after he becomes of age is a ratification of the mortgage. Uecker v. Koehn, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849. And see Callis v. Day, 38 Wis. 643. Acceptance of part of the proceeds of a sale under a deed of trust given while an infant. Darraugh v. Blackford, 84 Va. 509, 5 S. E. 542. Taking releases of part of premises mortgaged during infancy, and acquiescence for two years. Wilson v. Darragh, 55 Hun, 605, 7 N. Y. Supp. 810. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 41–55, 136–148.*

[48] Ashfield v. Ashfield, W. Jones, 157; Paramour v. Yardley, Plowd. 546. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 41–55, 136–148.*

[49] Henry v. Root, 33 N. Y. 526; Lawson v. Lovejoy, 8 Greenl. (Me.) 405, 23

recover, the purchase money of property sold by him, or suit to enforce any other kind of contract, would amount to a ratification of the contract.[50] Generally speaking, the act relied upon as a ratification must show an intention to affirm the contract; but the decisions are not in accord as to what acts are sufficient to show such an intention. Disposing of the property received under the contract, and the other acts above mentioned, would clearly show such intention; but where an infant has executed a conveyance, a mere offer, after attaining his majority, to execute a confirmatory deed if the other party will pay the balance of the purchase money, which offer is refused, clearly could not be regarded as a ratification of the sale and conveyance.[51]

Mere silence or acquiescence after becoming of age, without

Am. Dec. 526; Boyden v. Boyden, 9 Metc. (Mass.) 519; Robbins v. Eaton, 10 N. H. 561; Hubbard v. Cummings, 1 Greenl. (Me.) 11; Boody v. McKenney, 23 Me. 517; Ellis v. Alford, 64 Miss. 8, 1 South. 155; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538; Cheshire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735; Deason v. Boyd, 1 Dana (Ky.) 45; Shropshire v. Burns, 46 Ala. 108; Aldrich v. Grimes, 10 N. H. 194; Dana v. Coombs, 6 Greenl. (Me.) 89, 19 Am. Dec. 194; Armfield v. Tate, 29 N. C. 258; Callis v. Day, 38 Wis. 643; Hilton v. Shepherd, 92 Me. 160, 42 Atl. 387. This is expressly declared by statute in some states. See McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312. Retaining property after tendering it on disaffirmance, and on the other's refusal to receive it, is not a ratification. House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189. And see Scott v. Scott, 29 S. C. 414, 7 S. E. 811. The retention by a person, after becoming of age, of material furnished him during his minority in the construction of his house, is not a ratification of his purchase of the material, for he cannot return it. Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 41–55, 136–148.*

[50] Morrill v. Aden, 19 Vt. 505; Ferguson v. Bell's Adm'r, 17 Mo. 347; Pursley v. Hays, 17 Iowa, 310. Where an infant takes a deed and gives back a purchase-money mortgage, and the property is sold under the mortgage, the infant after his majority, by bringing ejectment against the purchaser, not only affirms the deed, but the mortgage. Kennedy v. Baker, 159 Pa. 146, 28 Atl. 252. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 41–55, 136–148.*

[51] Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569. When a note by an infant remains in part unpaid, mere acknowledgment of the debt, or payment of interest or part of principal, after becoming of age, is not a binding affirmance. Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245. Contra, American Mortgage Co. of Scotland v. Wright, 101 Ala. 658, 14 South. 399. So, where land has been purchased, and installment notes given by an infant, payment of some after becoming of age is not of itself a ratification. Rapid Transit Land Co. v. Sanford (Tex. Civ. App.) 24 S. W. 587. The recital in a mortgage executed after attaining majority, that it is subject to a mortgage executed during infancy, is a ratification of the prior mortgage. Ward v. Anderson, 111 N. C. 115, 15 S. E. 933. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 41–55, 136–148.*

more, does not, as a rule, amount to a ratification.[52] It is otherwise where the contract is one which requires disaffirmance, and there is a failure to disaffirm for an unreasonable time, under such circumstances as to lead others to act to their prejudice.[53]

SAME—WHAT AMOUNTS TO DISAFFIRMANCE

108. A contract is disaffirmed by any conduct which is inconsistent with the existence of the contract, and shows an intention not to be bound by it.

Disaffirmance, like ratification, may be implied, and it will generally be implied from conduct clearly inconsistent with the existence of the contract.[54] Where, for instance, a person who has sold and conveyed or mortgaged land or goods while an infant, sells, leases, or mortgages the same to another after becoming of age, this is a disaffirmance of his contract.[55] An action by a person, after becoming of age, to recover goods or land sold by him

[52] Durfee v. Abbott, 61 Mich. 471, 68 N. W. 521; Irvine v. Irvine, 9 Wall. 618, 19 L. Ed. 800; Tyler v. Fleming, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Hill v. Nelms, 86 Ala. 442, 5 South. 796. But see Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; ante, p. 206. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[53] Langdon v. Clayson, 75 Mich. 204, 42 N. W. 805; Lacy v. Pixler, 120 Mo. 883, 25 S. W. 206; Dolph v. Hand, 156 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25; Wheaton v. East, 5 Yerg. (Tenn.) 41, 62, 26 Am. Dec. 258; Hartman v. Kendall, 4 Ind. 403; Wallace's Lessee v. Lewis, 4 Har. (Del.) 80. *See "Infants," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 136–148.*

[54] Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; Vent v. Osgood, 19 Pick. (Mass.) 572; Whitmarsh v. Hall, 3 Denio (N. Y.) 375; Dallas v. Hollingsworth, 3 Ind. 537. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 41–63, 149–160.*

[55] Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173; Corbett v. Spencer, 63 Mich. 731, 30 N. W. 385; Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Chapin v. Shafer, 49 N. Y. 407; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Cresinger v. Welch's Lessee, 15 Ohio, 156, 45 Am. Dec. 565; Pitcher v. Layrock, 7 Ind. 398; McGan v. Marshall, 7 Humph. (Tenn.) 121; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464. In some jurisdictions a person is not allowed to convey land which is in the adverse possession of another. Here, therefore, an infant cannot avoid his deed of land by a second deed, executed while his first grantee or another is in the adverse possession of the land. He must first make an entry. Harrison v. Adcock, 8 Ga. 68. See Bool v. Mix, 17 Wend. (N. Y.) 133, 31 Am. Dec. 285. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 41–63, 149–160.*

during his minority, is a disaffirmance of the sale;[56] and a contract is disaffirmed by merely pleading infancy when suit is brought against him to enforce it.

At one time disaffirmance of a deed of land was required to be by some act as high and solemn as the deed; but, according to the weight of authority, this solemnity is no longer necessary, and a deed may be effectually avoided by any acts or declarations disclosing an unequivocal intent to repudiate it.[57]

SAME—EXTENT OF RATIFICATION OR DISAFFIRMANCE

109. The ratification or disaffirmance must be in toto. The contract cannot be ratified or disaffirmed in part only.

The disaffirmance or ratification must go to the whole contract. An infant cannot ratify a part which he deems for his benefit, and repudiate the rest.[58] He cannot, for instance, ratify a lease to himself, and avoid a covenant in it to pay rent; nor can he hold lands conveyed to him in exchange, and avoid the transfer of those with which he parted;[59] nor can he hold land conveyed to him, and repudiate a mortgage given at the time as part of the same transaction to secure the purchase money.[60]

[56] Clark v. Tate, 7 Mont. 171, 14 Pac. 761; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Philips v. Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; Stotts v. Leonhard, 40 Mo. App. 336; Scott v. Buchanan, 11 Humph. (Tenn.) 469; Hughes v. Watson, 10 Ohio, 134. Where, however, the action is based on the assumption that defendant is wrongfully in possession, as in the case of ejectment, the weight of authority seems to require that there shall have been some previous act of disaffirmance on the part of the infant, for until disaffirmance defendant is rightfully in possession. See Law v. Long, 41 Ind. 586; McClanahan v. Williams, 136 Ind. 30, 35 N. E. 897; Bool v. Mix, 17 Wend. (N. Y.) 135, 31 Am. Dec. 285; Clawson v. Doe, 5 Blackf. (Ind.) 300; Wallace's Lessee v. Lewis, 4 Har. (Del.) 75. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 57; Cent. Dig. §§ 41–63, 149–160.*

[57] McCarty v. Iron Co., 92 Ala. 463, 8 South. 417, 12 L. R. A. 136. And see note 55, supra. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 41–63.*

[58] Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Lowry v. Drake's Heirs, 1 Dana (Ky.) 46. Cf. O'Rourke v. Insurance Co., 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 31; Cent. Dig. §§ 41–63.*

[59] Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 31; Cent. Dig. §§ 41–63.*

[60] Hubbard v. Cummings, 1 Greenl. (Me.) 11; Uecker v. Koehn, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849; Bigelow v. Kinney, 3 Vt. 353, 21 Am.

As a rule, a person cannot retain property purchased by him during infancy, and repudiate the contract under which he received it; nor can he disaffirm a sale by him, and retain the consideration received; but as to this there is much conflict, and we must go into the subject at some length.

SAME—RETURN OF CONSIDERATION

110. An infant may disaffirm his executory contract without first returning the consideration he has received; but after disaffirmance he must return the consideration, if he has it.

111. If the contract has been executed by him, he cannot avoid it, and recover what he has paid, or for what he has done, without returning the consideration if he has it; but, by the weight of authority, if he has squandered or otherwise disposed of it during his minority, it is otherwise.

EXCEPTIONS—(a) Though the infant has the consideration, he may effectually disaffirm his executed contract without its return as a condition precedent, if he does not affirmatively seek relief; as, for instance, where he disaffirms his conveyance of land by conveying to another.

(b) Some courts hold that an infant cannot recover what he has paid, or for what he has done, under a contract by which he has received a substantial benefit, unless he can and does place the other party in statu quo. This probably does not apply to his conveyances of land.

As we have just stated, when a person avoids a contract made by him during his minority, he must, as a rule, return the consideration he has received.[61] As to whether or not he must do so as a condition precedent to disaffirmance, or whether the other party must be left to his action to recover the consideration after disaffirmance, and as to whether the consideration must be returned

Dec. 589; Heath v. West, 28 N. H. 108; Young v. McKee, 13 Mich. 556; Skinner v. Maxwell, 66 N. C. 45; Cogley v. Cushman, 16 Minn. 402 (Gil. 354); Callis v. Day, 38 Wis. 643; Ready v. Pinkham, 181 Mass. 351, 63 N. E. 887. Cf. Nottingham, etc., Soc. v. Thurston, 19 L. T. R. 54 (H. L.). *See "Infants," Dec. Dig. (Key-No.) §§ 30, 31; Cent. Dig. §§ 41–63.*

[61] Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Bigelow v. Kinney, 8 Vt. 353, 21 Am. Dec. 589; Wilhelm v. Hardman, 13 Md. 140; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Combs v. Hawes (Cal.) 8 Pac. 597 (statutory); Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Bartlett v. Cowles, 15 Gray (Mass.) 446. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

where it has been wasted or otherwise disposed of, the decisions are conflicting.

(a) Where the contract is executory on the part of the infant, and he has not ratified it by his conduct, as explained above,[62] it cannot, according to the weight of authority, be enforced against him, even though he retains the consideration received by him in kind. He need not return the consideration as a condition precedent to repudiating the contract and pleading his infancy in an action brought against him to enforce it.[63] When he repudiates his contract, however, he no longer has any right to the consideration he has received, and at least, if he has it, the other party may maintain an action to recover it.[64] According to the weight of authority, if he has disposed of the consideration so that he cannot return it in kind, he cannot be held liable for it. The adult is remediless.[65] It must be remembered that retaining the consideration may amount to a ratification.

(b) Where the contract is executed on the part of the infant, and he has the consideration received by him in kind, many cases hold that he cannot repudiate the contract, and recover what he has parted with, unless he returns, or offers to return, the consideration.[66] Many cases, on the other hand, go to the extent of saying without qualification that the return of the consideration in such a case is not a condition precedent to the right to disaffirm and recover what has been parted with; although, if the infant still retains the consideration, the adult may reclaim it, or, upon

[62] Ante, p. 209.

[63] Craighead v. Wells, 21 Mo. 409; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194. See, also, Nichols & Shepard Co. v. Snyder, 78 Minn. 502, 81 N. W. 516. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[64] Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209. Where an infant bought of another infant, and paid the price, and after the seller had spent the money the buyer disaffirmed the contract, and brought action to recover the money paid both in contract and in tort, it was held that the defendant's plea of infancy was a defense to the count in contract, and that there was no dealing with the money by the defendant which could constitute conversion. Drude v. Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[65] See Brawner v. Franklin, 4 Gill (Md.) 470; Boody v. McKenney, 23 Me. 517, 525. And see post, p. 215. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 41–63, 136–148.*

[66] See Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; LEMMON v. BEEMAN, 45 Ohio St. 505, 15 N. E. 476, Throckmorton Cas. Contracts, 140; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Robinson v. Weeks, 56 Me. 102; Johnson v. Ins. Co., 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187, 45 Am. St. Rep. 473; Lane v. Iron Co., 101 Tenn. 581, 48 S. W. 1094; Bell v. Burkhalter (Ala.) 57 South. 460. See, also, cases cited infra, note 74. Formal

demand and refusal, recover in trover.[67] That return of the consideration is not a condition to disaffirmance, where the disaffirmance by the infant is by dealing with the property he has parted with as his own, and where he is not seeking the aid of a court to recover it, is everywhere conceded; as where, having sold land and received the purchase money, he disaffirms by conveying the land to another. The latter deed is effectual though he has not returned the consideration for his prior deed.[68]

(c) According to the weight of authority, an infant, on attaining his majority, may disaffirm his contract, whether it is executory or executed, and in the latter case may recover back what he has parted with or for what he has done, without returning or offering to return the consideration received by him, if, during his minority, he has squandered or otherwise disposed of it so that he cannot return it.[69] The rule is also applied to cases where

tender is not required as a condition precedent to a suit by him, but restoration must be made on the trial as a condition of the judgment. Starr v. Watkins, 78 Neb. 610, 111 N. W. 363; Jones v. Valentine's School of Telegraphy, 122 Wis. 318, 99 N. W. 1043. Money borrowed by an infant mortgagor and used to pay off prior liens and for permanent improvements will be regarded in equity as in his hands; and in a suit to foreclose the mortgage after disaffirmance, relief may be given by a sale of the property and the application of the proceeds in such manner as to place the mortgagee in statu quo, provided this can be done without depriving the mortgagor of an interest equivalent to that which he had in the property at the time the mortgage was executed. MacGreal v. Taylor, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326. Cf. Nottingham, etc., Society v. Thurston, 19 L. T. R. 54 (H. of L.) affirming s. c. [1902] 1 Ch. 1 (C. A.) reversing s. c. [1901] 1 Ch. 88. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[67] Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Tucker v. Moreland, 10 Pet. 58, 73, 9 L. Ed. 345; Shaw v. Boyd, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368; McCarty v. Iron Co., 92 Ala. 463, 8 South. 417, 12 L. R. A. 136: Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; Drude v. Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[68] Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. § 59.*

[69] Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Boody v. McKenney, 23 Me. 517; LEMMON v. BEEMAN, 45 Ohio St. 505, 15 N. E. 476, Throckmorton Cas. Contracts, 140; Reynolds v. McCurry, 100 Ill. 356; Mustard v. Wohlford's Heirs, 15 Grat (Va.) 329, 76 Am. Dec. 209; Miller v. Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Mordecai v. Pearl, 63 Hun, 553, 18 N. Y. Supp. 543; Petrie v. Williams, 68 Hun, 589, 23 N. Y. Supp. 237; Brandon v. Brown, 106 Ill. 519; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Harvey v. Briggs, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62; Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Ridgeway v. Herbert,

the consideration is of such a nature that it cannot be returned, as, for example, instruction, or personal services,[70] or insurance on one's life.[71] He is not bound to return an equivalent.[72] Some of the courts extend this rule to cases in which the infant was even benefited by disposing of the consideration.[73] The principle on which this rule is based is that the privilege of the infant to avoid his contracts is intended to protect him against the improvidence which is incident to his immaturity, and that to require him to return the consideration received and squandered or otherwise disposed of during his minority would be to withdraw this protection, and frustrate the object of the law. This rule has been applied, not only where the contract was a sale and conveyance of land by the infant, but to sales of personalty and other contracts as well.

(d) Many courts, on the other hand, apply the principle that the privilege of an infant is intended as a shield, and not as a sword—or, in other words, as a protection to the infant, and not as an instrument of fraud and injustice to others—hold, or have held, that an infant cannot avoid his executed contracts, whereby he has benefited, and recover what he has parted with, or for what he has done, unless he can and does restore the consideration he has received; and that it is immaterial that the consideration has been disposed of by him, or for any other reason cannot be returned. In other words, they hold that an infant who receives a substantial consideration for his executed contract cannot, on

150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; MacGreal v. Taylor, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; Bullock v. Sprowls, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; White v. Cotton Waste Corp., 178 Mass. 20, 59 N. E. 642; Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; Shipley v. Smith, 162 Ind. 526, 70 N. E. 803; Lake v. Perry, 95 Miss. 550, 49 South. 569. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[70] International Text-Book Co. v. Doran, 80 Conn. 307, 68 Atl. 255. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[71] Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[72] Simpson v. Prudential Ins. Co., supra; Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, and note, 42 Am. St. Rep. 665. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[73] A minor who contracts with his employer that the price of articles, not necessaries, purchased by him from his employer, shall be deducted from his wages, may, on becoming of age, repudiate his contract, and recover his wages without deduction; and this, even though he may have disposed of the articles to his benefit. Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263. And see Genereux v. Sibley, 18 R. I. 43, 25 Atl. 345. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

attaining his majority, avoid the contract, and recover what he has parted with, unless he can and does place the other party in statu quo.[74]

So it has been held that the executed contract of an infant for the performance of personal services by him may not be disaffirmed if not so unreasonable as to be evidence of fraud or undue advantage in its procurement.[75] This exception to the general rule is made for the benefit and protection of the infant. As said in a Michigan case:[76] "Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessaries of life in compensation for his services without the risk of a lawsuit; and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven perhaps to vagrancy and crime."

And in some states the right of an infant to disaffirm a contract made by him when over a certain age is, by statute, made dependent upon his restoring the consideration or paying its equivalent, with interest.[77]

[74] Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Wilhelm v. Hardman, 13 Md. 140; Holden v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Womack v. Womack, 8 Tex. 397, 417, 58 Am. Dec. 119; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113. The right to avoid is conditional on his restoring what he received in specie, or, if he cannot, on his accounting for its value. Heath v. Stevens, 48 N. H. 251; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Bartlett v. Bailey, 59 N. H. 408; Riley v. Mallory, 33 Conn. 201. In England the right to avoid an executed sale and recover back the price is denied. Holmes v. Blogg, 8 Taunt. 508; Ex parte Taylor, 8 De G. M. & G. 258. See, also, Williams v. Pasquali, Peake, Add. Cas. 197; Valentini v. Canali, 24 Q. B. D. 166. Where the personal contract of an infant is fair and reasonable, and free from fraud or undue influence, and has been wholly or partly performed on both sides, so that the infant has enjoyed the benefits of it, but has parted with what he has received, or the benefits are of such a nature that he cannot restore them, he cannot recover back what he has paid. Johnson v. Insurance Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; Alt v. Graff, 65 Minn. 191, 68 N. W. 9. See, also, Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703. Cf. Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

[75] Squier v. Hydliff, 9 Mich. 274; Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; Robinson v. Van Vleet, 91 Ark. 262, 121 S. W. 288; Ping Min. & Mill. Co. v. Grant, 68 Kan. 732, 75 Pac. 1044. *See "Infants," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 112, 113, 159.*

[76] Squier v. Hydliff, supra, per Christiancy, J. *See "Infants," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 112, 113, 159.*

[77] Age 18. Spencer v. Collins, 156 Cal. 298, 104 Pac. 320, 20 Ann. Cas. 49; Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848; Helland v. Colton State Bank, 20 S. D. 325, 106 N. W. 60, holding, however, that a contract of suretyship may be avoided by mere disaffirmance, since the infant can derive no advantage from it. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 59, 157.*

SAME—EFFECT OF RATIFICATION AND DISAFFIRMANCE

112. Ratification renders the contract absolutely binding ab initio.

113. Disaffirmance renders the contract absolutely void ab initio, and the rights of the parties are determined as if there had never been a contract between them.

114. Third parties, therefore, acquire no rights under an avoided contract.

Ratification

The effect of a ratification, whether it is in express words or implied from conduct is to render the contract binding ab initio.[78] The new promise is not a new contract, but simply a ratification of the original contract; and a suit if brought must be on the original contract, and not on the new promise. The ratification cannot afterwards be retracted and the contract disaffirmed.[79]

Disaffirmance

So disaffirmance of a contract relates back to the date of the contract, and renders it void on both sides ab initio;[80] and it follows that the rights of the parties must be determined as if there never had been any contract. One, therefore, who has occupied land under a deed by an infant which is avoided by him on becoming of age is liable for rents during the time of his occupation, just as if there has been no deed.[81] If the infant's vendee has sold the property to a third person, the latter occupies no better position than the vendee, and the property may be recovered from him even

[78] Ward v. Anderson, 111 N. C. 115, 15 S. E. 933; Palmer v. Miller, 25 Barb. (N. Y.) 399; Minock v. Shortridge, 21 Mich. 316; Hall v. Jones, 21 Md. 439. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 48, 147.*

[79] Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848; Hastings v. Dollarhide, 24 Cal. 195. So, where a contract has been in part affirmed by a new arrangement and promise, the affirmance is not avoided by the fact that because of a subsequent disagreement the arrangement is not carried out. Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541. *See "Infants," Dec. Dig. (Key-No.) §§ 30, 57; Cent. Dig. §§ 48, 147.*

[80] RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton Cas. Contracts, 143; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; French v. McAndrew, 61 Miss. 187; Boyden v. Boyden, 9 Metc. (Mass.) 519; Hoyt v. Wilkinson, 57 Vt. 404; Mette v. Feltgen (Ill.) 27 N. E. 911; Id., 148 Ill. 357, 36 N. E. 81; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Vent v. Osgood, 19 Pick. (Mass.) 572. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 62, 158, 159.*

[81] French v. McAndrew, 61 Miss. 187. *See "Infants," Dec. Dig. (Key-No.) §§ 31, 58; Cent. Dig. §§ 62, 158, 159.*

though he was a purchaser for value, and without notice of the defeasible nature of the title.[82] Or if the infant elects to sue his vendee, he may recover the market value of the property at the time of disaffirmance.[83]

Where services have been rendered by an infant under a voidable contract, and he has received nothing under it, he may, on disaffirming the contract, recover the value of the services as upon an implied contract.[84] In such a case he may, according to the better opinion, recover without any deduction for damages caused by his breach of the contract, for to allow such a deduction would be, in effect, to enforce the contract.[85] So, also, if an infant has paid money or parted with other property under a voidable contract, and has himself received nothing, he may recover what he has parted with on avoiding the contract.[86] As to whether an infant who has received something under his contract can avoid it and recover what he has parted with, or for what he has done, the authorities are conflicting. We have already discussed this question, and shown the different positions which the courts have taken.[87]

A disaffirmance cannot be retracted. Ratification of a contract after it has once been disaffirmed comes too late.[88]

[82] Hill v. Anderson, 5 Smedes & M. (Miss.) 216; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Downing v. Stone, 47 Mo. App. 144; Miles v. Lingerman, 24 Ind. 385. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. § 62.*

[83] Beickler v. Guenther, 121 Iowa, 419, 96 N. W. 895. *See "Infants," Dec. Dig. (Key-No.) § 31; Cent. Dig. § 62.*

[84] Medbury v. Watrous, 7 Hill (N. Y.) 110; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Vent v. Osgood, 19 Pick. (Mass.) 572; Ray v. Haines, 52 Ill. 485; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Vehue v. Pinkham, 60 Me. 142; Lowe v. Sinklear, 27 Mo. 308; Dallas v. Hollingsworth, 3 Ind. 537; Lufkin v. Mayall, 25 N. H. 82; Dearden v. Adams, 19 R. I. 217, 36 Atl. 3. But he can recover no more than he is equitably entitled to under all the circumstances. Hagerty v. Lock Co., 62 N. H. 576. *See "Infants," Dec. Dig. (Key-No.) §§ 49, 58; Cent. Dig. § 159.*

[85] Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Whitmarsh v. Hall, 3 Denio (N. Y.) 375; Radley v. Kenedy (City Ct. Brook.) 14 N. Y. Supp. 268. But see Moses v. Stevens, 2 Pick. (Mass.) 332; Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690. The defendant may set off any legal claim against the infant; as, for instance, for necessaries furnished him. Meredith v. Crawford, 34 Ind. 309. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. § 159.*

[86] Stafford v. Roof, 9 Cow. (N. Y.) 626; Corpe v. Overton, 10 Bing. 252; Millard v. Hewlett, 19 Wend. (N. Y.) 301. And see cases cited in note 69, supra. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 158, 159.*

[87] Ante, p. 213.

[88] McCarty v. Iron Co., 92 Ala. 463, 8 South. 417, 12 L. R. A. 136; Pippen

SAME—TORTS IN CONNECTION WITH CONTRACTS

115. Though an infant is liable for his torts, a breach of contract cannot be treated as a tort, so as to make him liable. The tort must be separate and independent of it.

116. At common law, though it is otherwise in equity, an infant's false representations as to his age will not estop him from avoiding his contract; they may, however, render him liable in an action for deceit.

Though an infant is liable for his torts, it is well settled that a breach of contract cannot be treated as a tort, so as to make him liable. The wrong, according to the weight of authority, must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it.[88] "The test of an action against an infant," it has been said, "is whether a liability can be made out without taking notice of the contract."[89] Or, according to an Indian case: "The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise?"[91] Thus an infant cannot be held liable for false warranty on the sale or ex-

v. Insurance Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505. *See "Infants," Dec. Dig. (Key-No.) § 58; Cent. Dig. §§ 158, 159.*

[88] Jennings v. Rundall, 8 Term R. 335, Ewell, Lead. Cas. 185; Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Freeman v. Roland, 14 R. I. 39, 51 Am. Rep. 340; West v. Moore, 14 Vt. 447, 39 Am. Dec. 235; Campbell v. Perkins, 8 N. Y. at page 440; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Mathews v. Cowan, 59 Ill. 341; Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356. But see Vance v. Word, 1 Nott & McC. (S. C.) 197, 9 Am. Dec. 683; Peigne v. Sutcliffe, 4 McCord (S. C.) 387, 17 Am. Dec. 756; RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton Cas. Contracts, 143; Fitts v. Hall, 9 N. H. 441. An infant is not bound on his warranties in an application for insurance, and the insurer cannot defend an action on the policy by proving their falsity. O'Rourke v. Insurance Co., 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643. A promise by an infant to marry is not binding on him, but he may nevertheless be held liable for his tort in seducing a woman under promise of marriage. Becker v. Mason, 93 Mich. 336, 53 N. W. 361. *See "Infants," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 161–166.*

[89] Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673 and note, 91 Am. St. Rep. 744; Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202, Ann. Cas. 1913A, 969. *See "Infants," Dec. Dig. (Key-No.) §§ 56, 59; Cent. Dig. §§ 99, 100, 161–166.*

[91] RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton Cas. Contracts, 143. *See "Infants," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 161–166.*

change of a horse.[92] And where an infant hired a horse to ride, and injured it by overriding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence.[93] On the other hand, where an infant hired a horse expressly for riding, and not for jumping, and then lent it to a friend, who killed it in jumping, he was held liable, because what he had done was not an abuse of the contract, but an act which he was expressly forbidden to do, and was, therefore, independent of the contract.[94]

The fraud of an infant in falsely representing himself to be of age, and so inducing another to contract with him, does not estop him from pleading his infancy if sued upon his contract.[95] He may, however, in many jurisdictions, be held liable in an action for deceit.[96] In equity, where the infant has falsely represented that

[92] Collins v. Gifford, 208 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202, Ann. Cas. 1913A, 969; Green v. Greenbank, 2 Marsh. 485 (in which it is said "the assumpsit is clearly the foundation of the action; for it is in fact undertaking that the horse was sound"). *See "Infants," Dec. Dig. (Key-No.) § 62; Cent. Dig. § 168.*

[93] Jennings v. Rundall, 8 Term R. 335. He may, however, sue in trespass, though he cannot bring an action on the case, as the latter, but not the former, would be based on lawful possession in defendant under the contract. Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561. *See "Infants," Dec. Dig. (Key-No.) § 61; Cent. Dig. § 167.*

[94] Burnard v. Haggis, 15 C. B. (N. S.) 45; Homer v. Thwing, 3 Pick. (Mass.) 492; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519. But see Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356. *See "Infants," Dec. Dig. (Key-No.) § 61; Cent. Dig. § 167.*

[95] RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton Cas. Contracts, 143; Studwell v. Shapter, 54 N. Y. 249; Burdett v. Williams (D. C.) 30 Fed. 697; Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676; Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Brown v. McCune, 5 Sandf. (N. Y.) 228; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87; Norris v. Vance, 3 Rich. Law (S. C.) 164; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678; McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312; Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953, 114 Am. St. Rep. 594; Harper v. Utsey (Tex. Civ. App.) 97 S. W. 508. But see Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Carolina Interstate Building & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975; New York Building Loan Banking Co. v. Fisher, 20 Misc. Rep. 244, 45 N. Y. Supp. 795. Contra, under Kansas statute, Dillon v. Burnham, 43 Kan. 77, 22 Pac. 1016. *See "Infants," Dec. Dig. (Key-No.) § 56; Cent. Dig. § 100.*

[96] Fitts v. Hall, 9 N. H. 441; RICE v. BOYER, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, Throckmorton Cas. Contracts, 143; Wallace v. Morss, 5 Hill (N. Y.) 391; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Eckstein v. Frank, 1 Daly (N. Y.) 334. Contra, Nash v. Jewett, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep.

he was of age, or taken active steps to conceal his age, or been otherwise guilty of fraud, and has thereby induced the other party to enter into the contract, his fraud will estop him from pleading his infancy to the other's prejudice.[97] Mere failure to disclose his age, however, is not such fraud as will warrant equitable interference with the common-law rule;[98] nor is mere misrepresentation of age sufficient, if it does not in fact deceive the other party.[99] Where an infant obtains goods by false and fraudulent representations as to his age, the better opinion is that the other party may rescind and recover them back.[1]

We have already to some extent noticed the remedies of the adult party where an infant repudiates his contract after having received the consideration. In such a case, he no longer has a right to hold the consideration; and, if he refuses to return it, he is, according to the better opinion, guilty of a tort, for which the other party may maintain an action.[2]

931; Johnson v. Pie, 1 Sid. 258; Slayton v. Barry, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510. He is not liable in trover. Slayton v. Barry, supra. *See "Infants," Dec. Dig. (Key-No.) § 56; Cent. Dig. § 100.*

[97] Ferguson v. Bobo, 54 Miss. 121; Commander v. Brazil, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; County Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643 (in which it is said, per Miller, J.: "The rule is simply an application of the equitable doctrine that he who misleads another by his solemn assertion of a fact will not be allowed to assert the contrary to the prejudice of the person whom he has thus misled, and so perpetrate a fraud upon him"). International Land Co. v. Marshall, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056 (holding that an infant guilty of fraud may not have his deed canceled without offering to refund the consideration received). But "in order to raise estoppel out of the evidence against the minor, that evidence must plainly show, not doubtfully or vaguely, but clearly and convincingly, the presence of actual, active, and willful fraud and misrepresentation." Lake v. Perry, 95 Miss. 550, 49 South. 569, 574, per Whitfield, C. J. And see Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50, where estoppel is said to be confined to cases where the infant is in fact developed to the condition of actual discretion, and to cases of actual fraud, and where the contract or transaction is beneficial. *See "Infants," Dec. Dig. (Key-No.) § 56; Cent. Dig. § 100.*

[98] Baker v. Stone, 136 Mass. 405; Sewell v. Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606; Davidson v. Young, 38 Ill. 145; Brantley v. Wolf, 60 Miss. 420; Price v. Jennings, 62 Ind. 111; Thormaehlen v. Kaeppel, 86 Wis. 378, 56 N. W. 1089. *See "Infants," Dec. Dig. (Key-No.) § 56; Cent. Dig. § 100.*

[99] International Text-Book Co. v. Doran, 80 Conn. 307, 68 Atl. 255; Charles v. Hastedt, 51 N. J. Eq. 171, 26 Atl. 564. *See "Infants," Dec. Dig. (Key-No.) §§ 55, 56; Cent. Dig. §§ 100, 135.*

[1] Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Neff v. Landis, 110 Pa. 204, 1 Atl. 177. *See "Infants," Dec. Dig. (Key-No.) § 56; Cent. Dig. § 100.*

[2] Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Vasse v. Smith, 6 Cranch, 226, 3

If the infant, while rightfully in possession of the consideration which he has received, has wasted or disposed of it during his minority, and he is allowed to disaffirm his contract, the other party is remediless,[2] unless he can trace the property into the hands of those who obtained it from the infant.

INSANE PERSONS—IN GENERAL

117. As a rule, a contract entered into by an insane person, or person non compos mentis, is voidable at his option; but the rule is subject to exceptions, as follows:[4]

EXCEPTIONS—(a) The following contracts are valid and binding:

(1) Contracts created by law, or quasi contracts.

(2) In most, but not all, jurisdictions, where the sane party acted fairly and in good faith, without actual or constructive knowledge of the other's insanity, and the contract has been so far executed that he cannot be placed in statu quo.

(b) The following contracts are void:

(1) In most, but not all, jurisdictions, contracts by a person who has been judicially declared insane on inquisition, and placed under guardianship.

(2) In a few jurisdictions, deeds; and, in most jurisdictions, powers of attorney or other appointments of an agent.

Formerly it was thought that a man could not avoid a contract entered into while he was non compos mentis. It was said to be a maxim of the common law that no man of full age should be allowed by plea to stultify himself, and thereby avoid his own deed or contract.[5] It seems, however, that this never was the common law, and that the cases so holding were erroneous.[6] At any rate, the

L. Ed. 207; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732. *See "Infants," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 180–183.*

[3] Ante, p. 215, note 69.

[4] In Ipock v. Atlantic & N. C. R. Co., 158 N. C. 445, 74 S. E. 352, this statement of the black letter text, together with that in Exception (a), (2), is quoted and approved. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[5] Beverley's Case, 4 Coke, 123; Co. Litt. 147; 2 Bl. Comm. 292. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[6] Fitzh. Nat. Brev. 202; Yates v. Boen, 2 Strange, 1104; Webster v. Woodford, 3 Day (Conn.) 90; Mitchell v. Kingman, 5 Pick. (Mass.) 431; Cameron-

doctrine has long since been exploded, and it is almost universally held that a contract made by a person who is lacking in mental capacity, unless he has been judicially declared insane, is at most voidable.[7]

The incapacity may result from lunacy,[8] from idiocy,[9] from imbecility,[10] from senile dementia,[11] or any other defect or disease of the mind, whatever may be its cause.[12] To render a person thus incapable of contracting, his infirmity need not be so great as to dethrone his reason, nor amount to entire want of reason;[13] but, on the other hand, it must be something more than mere weakness of intellect.[14] It must be such as to render the person incapable

Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[7] Post, p. 227. Prior to inquest, sanity is presumed, and the burden of proof is on the party alleging insanity. Hill-Dodge Banking Co. v. Loomis, 140 Mo. App. 62, 119 S. W. 967. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[8] Merritt v. Gumaer, 2 Cow. (N. Y.) 552. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[9] Burnham v. Kidwell, 113 Ill. 425; Ball v. Mannin, 3 Bligh (N. S.) 1, Ewell, Lead. Cas. 534. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[10] Smith's Committee v. Forsythe, 90 S. W. 1075, 28 Ky. Law Rep. 1034. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[11] As to weakness of intellect or imbecility from old age, see Guild v. Hull, 127 Ill. 523, 20 N. E. 665; Peabody v. Kendall, 145 Ill. 519, 32 N. E. 674; Argo v. Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Lynch v. Doran, 93 Mich. 395, 54 N. W. 882; King v. Cummings, 60 Vt. 502, 11 Atl. 727; Keeble v. Cummins, 5 Hayw. (Tenn.) 43; Coleman v. Frazer, 3 Bush (Ky.) 300; Bressey's Adm'r v. Gross (Ky.) 7 S. W. 150; Clark v. Kirkpatrick (N. J. Ch.) 16 Atl. 309; Trimbo v. Trimbo, 47 Minn. 389, 50 N. W. 350; Cole v. Cole, 21 Neb. 84, 31 N. W. 493; Crowe v. Peters, 63 Mo. 429; Shaw v. Ball, 55 Iowa, 55, 7 N. W. 413; Marshall v. Marshall, 75 Iowa, 132, 39 N. W. 230. Old age is not of itself evidence of incapacity. Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383. And see cases cited above. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[12] See Henderson v. McGregor, 30 Wis. 78; Brothers v. Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Somes v. Skinner, 16 Mass. 348; Hale v. Brown, 11 Ala. 87; Conant v. Jackson, 16 Vt. 335; Wilson v. Oldham, 12 B. Mon. (Ky.) 55; Johnson v. Chadwell, 8 Humph. (Tenn.) 145. Result of habitual drunkenness: Bliss v. Railroad Co., 24 Vt. 424; Menkins v. Lightner, 18 Ill. 282. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[13] Ball v. Mannin, 3 Bligh (N. S.) 1, Ewell, Lead. Cas. 534. For good illustration of degree of mental infirmity sufficient to constitute incapacity, see Smith's Committee v. Forsythe, 90 S. W. 1075, 28 Ky. Law Rep. 1034. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[14] Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Stone v. Wilbern, 83 Ill. 105; Lawrence v. Willis, 75 N. C. 471; Simonton v. Bacon, 49 Miss. 582; Des Moines Nat. Bank v. Chisholm, 71 Iowa, 675, 33 N. W. 234; Farnam v.

of comprehending the subject of the contract, and its nature and probable consequences.[15] He need not be permanently insane; it is enough if he is insane at the time he enters into the contract.[16] A contract made during a lucid interval is binding.[17]

Nor need the insanity be general. A person who is laboring under an insane delusion is incapable of making a binding contract if his delusion is so connected with the subject-matter of the contract as to render him incapable of comprehending its nature and probable consequences. If such was his condition, he may avoid the contract, though he may have been perfectly sane in respect of other matters, and might have been able to make a binding contract in reference to some other subject-matter.[18]

Brooks, 9 Pick. (Mass.) 212; Guild v. Hull, 127 Ill. 523, 20 N. E. 665; Davis v. Phillips, 85 Mich. 198, 48 N. W. 513; White v. Farley, 81 Ala. 563, 8 South. 215; Maddox v. Simmons, 31 Ga. 528; Kimball v. Cuddy, 117 Ill. 213, 7 N. E. 589; Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; Cain v. Warford, 33 Md. 23; Cadwallader v. West, 48 Mo. 483. The fact that a person is deaf and dumb does not alone render him incapable. See Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; Barnett v. Barnett, 54 N. C. 221. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[15] Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Perry v. Pearson, 135 Ill. 218, 25 N. E. 636; Bond v. Bond, 7 Allen (Mass.) 1; Young v. Stevens, 48 N. H. 135, 2 Am. Rep. 202, 97 Am. Dec. 592; Musselman v. Cravens, 47 Ind. 1; Lilly v. Waggoner, 27 Ill. 396; Baldwin v. Dunton, 40 Ill. 188; Titcomb v. Vantyle, 84 Ill. 371; Worthington v. Worthington (Md.) 20 Atl. 911; Brown v. Brown, 108 Mass. 386; Crowther v. Rowlandson, 27 Cal. 381; Somers v. Pumphrey, 24 Ind. 231; Burnham v. Mitchell, 34 Wis. 136; Henderson v. McGregor, 30 Wis. 78; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Hovey v. Hobson, 55 Me. 256; Aiman v. Stout, 42 Pa. 114; Noel v. Karper, 53 Pa. 97; Dicken v. Johnson, 7 Ga. 484; Lozear v. Shields, 23 N. J. Eq. 509; Tolson's Adm'r v. Garner, 15 Mo. 494; Swartwood v. Chance, 131 Iowa, 714, 109 N. W. 297; Ratliff v. Baltzer's Adm'r, 13 Idaho, 152, 89 Pac. 71. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[16] Curtis v. Brownell, 42 Mich. 165, 3 N. W. 936; Peaslee v. Robbins, 3 Metc. (Mass.) 164; Jenners v. Howard, 6 Blackf. (Ind.) 240. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[17] Hall v. Warren, 9 Ves. 605; Lilly v. Waggoner, 27 Ill. 395; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Smith v. Smith, 108 N. C. 365, 12 S. E. 1043, and 13 S. E. 113; Jones' Adm'r v. Perkins, 5 B. Mon. (Ky.) 222; Norman v. Trust Co., 92 Ga. 295, 18 S. E. 27; Beckwith v. Butler, 1 Wash. (Va.) 224; Carpenter v. Carpenter, 8 Bush (Ky.) 283; Staples v. Wellington, 58 Me. 453; Stewart v. Redditt, 3 Md. 81; Wright v. Market Bank (Tenn.) 60 S. W. 623. The authorities are conflicting as to whether the burden is on the other party to show that the contract was made in a lucid interval. That it is, see Fishburne v. Ferguson's Heirs, 84 Va. 87, 4 S. E. 575; Sheets v. Bray, 125 Ind. 33, 24 N. E. 357; Hall v. Warren, 9 Ves. 605. Contra, Wright v. Wright, 139 Mass. 177, 29 N. E. 380. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[18] Bond v. Bond, 7 Allen (Mass.) 1; Riggs v. Tract Soc., 93 N. Y. 503;

Effect of Contracts

Thus far we have spoken of the contracts of a person non compos mentis as being voidable only, and as a rule they are so; but, as in the case of infants, some of his contracts as valid, and some of them are held to be absolutely void. In some jurisdictions the contract is held binding where the other party acted in good faith, and without knowledge of the insanity. Of this we will presently speak at some length.

Same—Quasi Contracts

As in the case of infancy, the rule that a person may avoid a contract made while he was insane does not apply to so-called contracts created by law, or quasi contracts, for here the obligation is imposed by law without regard to the consent of the party bound.[19]

Same—Contracts for Necessaries

Nor does the rule apply to the contracts of a person non compos mentis for necessaries furnished to himself or to his wife, or, in some jurisdictions, to his children.[20] The rules on this subject are substantially the same as in the case of an infant's necessaries; except, it seems, that, unlike an infant, a person non compos mentis is liable for labor and materials furnished for the preservation of his estate, where they were necessary for its preservation.[21] In

Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Searle v. Galbraith, 73 Ill. 269; Alston v. Boyd, 6 Humph. (Tenn.) 504; Samuel v. Marshall, 3 Leigh (Va.) 567; Dominick v. Randolph, 124 Ala. 557, 27 South. 481. Monomania on the subject of religion or spiritualism. Boyce's Admr v. Smith, 9 Grat. (Va.) 704, 60 Am. Dec. 313; Lewis v. Arbuckle, 85 Iowa, 335, 52 N. W. 237, 16 L. R. A. 677; West v. Russell, 48 Mich. 74, 11 N. W. 812; Burgess v. Pollock, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218. *See "Insane Persons," Dec. Dig. (Key-No.) § 72; Cent. Dig. § 125.*

[19] Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; post, p. 644. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. §§ 125–132.*

[20] La Rue v. Gilkyson, 4 Pa. 375, 45 Am. Dec. 700; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Baxter v. Portsmouth, 5 Barn. & C. 170; Van Horn v. Hann, 39 N. J. Law, 207; Read v. Legard, 6 Exch. 636; Surles v. Pipkin, 69 N. C. 513; Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Sawyer v. Lufkin, 56 Me. 308; Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Kendall v May, 10 Allen (Mass.) 59; Rhodes v. Rhodes, 44 Ch. Div. 94; Sceva v. True, 53 N. H. 627. Liability for necessaries furnished his wife. Read v. Legard, supra. And see Smith's Committee v. Forsythe, 90 S. W. 1075, 28 Ky. Law Rep. 1034, holding imbecile liable for necessaries furnished himself, wife, and children, although the other party had knowledge of his incapacity to contract. He has even been held liable for luxuries furnished in good faith. Kendall v. May, supra. *See "Insane Persons," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 89, 128, 129.*

[21] Williams v. Wentworth, 5 Beav. 325. *See "Insane Persons," Dec. Dig (Key-No.) § 75; Cent. Dig. §§ 89, 128, 129.*

all cases the credit must have been given to the insane person, and not to some third person.[22] The fact that the person has been judicially declared insane, and placed under guardianship, does not prevent his liability for necessaries.[23]

Same—Void and Voidable

It has been held by some courts that the deed of an insane person,[24] or a power of attorney or other appointment of an agent,[25] is absolutely void. In most jurisdictions, however, no distinction is made in this respect between the deed of an insane person and that of an infant. It is held to be voidable, and not void.[26] As an almost universal rule, all his contracts other than valid ones are not void, but simply voidable at his option;[27] and they are binding on the other party if he elects to hold him.[28]

[22] Bish. Cont. § 968; Massachusetts General Hospital v. Fairbanks, 129 Mass. 78, 37 Am. Rep. 303; Id., 132 Mass. 414. *See "Insane Persons," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 89, 128, 129.*

[23] McCrillis v. Bartlett, 8 N. H. 569; Sawyer v. Lufkin, 56 Me. 308; Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Baxter v. Portsmouth, 5 Barn. & C. 170; Fruitt v. Anderson, 12 Ill. App. 421. *See "Insane Persons," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 89, 128, 129.*

[24] Van Deusen v. Sweet, 51 N. Y. 378 (but see Ingraham v. Baldwin, 9 N. Y. 45); Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512; In re Estate of Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504; Goodyear v. Adams, 52 Hun, 612, 5 N. Y. Supp. 275; Brown v. Miles, 61 Hun, 453, 16 N. Y. Supp. 251; Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Thompson v. Leach, 3 Salk. 300; Edwards v. Davenport (C. C.) 20 Fed. 756. *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. §§ 93–99.*

[25] Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73. And see Marvin v. Inglis, 39 How. Prac. (N. Y.) 329; Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25; McClun v. McClun, 176 Ill. 376, 52 N. E. 928. But see Williams v. Sopieha, 94 Tex. 430, 61 S. W. 115; Tiffany, Ag. 98. *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. §§ 93–99.*

[26] HOVEY v. HOBSON, 53 Me. 451, 89 Am. Dec. 705, Throckmorton, Cas. Contracts, 149; Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Arnold v. Iron Works, 1 Gray (Mass.) 434; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Evans v. Horan, 52 Md. 602; Burnham v. Kidwell, 113 Ill. 425; Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 245, 19 Am. Dec. 71; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, and note, 35 Am. St. Rep. 443. *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. §§ 93–99.*

[27] Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716; Carrier v. Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707; Burnham v. Kidwell, 113 Ill. 425; Ar-

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[28] See note 28 on following page.

Inquisition and Adjudication of Lunacy

In most jurisdictions it is held—in some, however, by reason of express statutory provisions—that if a person has been judicially determined to be insane, and placed under guardianship, the decree and letters of guardianship take from him all capacity to contract, and that his contracts while under guardianship are absolutely void.[29] It has been held, however, that this rule applies only where there has been a judgment of a court of competent jurisdiction declaring the person of unsound mind and incapable of managing his own estate, and appointing a guardian or committee for that purpose, and that it does not apply to statutory proceedings merely to determine whether a person is insane for the purpose of committing him to a hospital for the insane.[30] In other jurisdictions the fact that he has been adjudged insane, and placed under guardianship, only raises a presumption of incapacity to contract, which may be rebutted; but the presumption is very strong, and the proof of capacity must be clear.[31]

nold v. Iron Works, 1 Gray (Mass.) 434; HOVEY v. HOBSON, 53 Me. 451, 89 Am. Dec. 705, Throckmorton, Cas. Contracts, 149; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; Ætna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481. Contra in Alabama. Walker v. Winn, 142 Ala. 560, 39 South. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 337, where it is said: "Whatever may be the rulings of other jurisdictions upon the question, this court is fully committed to the doctrine that the contract of an insane person is absolutely void." *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. §§ 93–99.*

[28] Harmon v. Harmon (C. C.) 51 Fed. 113; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309; San Francisco Credit Clearing-House v. McDonald, 18 Cal. App. 212, 122 Pac. 964 (holding that the other party may not avoid the contract even under a statute declaring that "a person entirely without understanding has no power to make a contract of any kind"). *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. §§ 93–99.*

[29] Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Leonard v. Leonard, 14 Pick. (Mass.) 280; Rannels v. Gerner, 80 Mo. 474; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; Bradbury v. Place (Me.) 10 Atl. 461; Mohr v. Tulip, 40 Wis. 66; Griswold v. Butler, 3 Conn. 227. Where the guardian was discharged as being an unsuitable person, and no other guardian was appointed, the decree adjudging the ward insane was not conclusive as to his incapacity after the guardian's discharge. Willwerth v. Leonard, 156 Mass. 277, 31 N. E. 299. *See "Insane Persons," Dec. Dig. (Key-No.) § 26; Cent. Dig. § 36.*

[30] Knox v. Haug, 48 Minn. 58, 50 N. W. 934; Leinss v. Weiss, 33 Ind. App. 344, 71 N. E. 254. "His discharge as cured is as much a notice of the fact that he is sane as the inquest and admission to the asylum is notice of his insanity." Henley, J., in Leinss v. Weiss, supra. *See "Insane Persons," Dec. Dig. (Key-No.) § 26; Cent. Dig. § 36.*

[31] As to this, see Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997; Hart v. Deamer, 6 Wend. (N. Y.) 497; Parker v. Davis, 53 N. C. 460; Hopson v. Boyd, 6 B. Mon. (Ky.) 296; Snook v. Watts, 11 Beav. 105; In re Gangwere's Es-

Ignorance and Good Faith of the Other Party

In some states it is held that the contract of an insane person may be avoided by him, though it is fair and reasonable, and though it was entered into by the other party in perfect good faith, and in ignorance of his infirmity.[32] "The fairness of the defendant's conduct," it was said in a leading Massachusetts case, "cannot supply the plaintiff's want of capacity." [33]

The weight of authority in this country, however, is in favor of the doctrine that, if the sane party did not know, or have reasonable cause to know, of the other's insanity, and acted in good faith, and the contract was fair, and has been so far executed that the parties cannot be placed in statu quo, it cannot be avoided.[34] In Molton v. Camroux, a leading English case, a lunatic had purchased annuities of a society, paid the money, and died, whereupon his administratrix sued the society to recover back the money on the ground that the contract was void. The jury found that at the time of the contract the deceased was insane, but that there was nothing to indicate this to the defendant, and that the transaction was in good faith. It was held that the money could not be recovered. "The modern cases show," it was said, "that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored to their original posi-

tate, 14 Pa. 417, 53 Am. Dec. 554; Topeka Water Supply Co. v. Root, 56 Kan. 187, 42 Pac. 715; Lower v. Schumacher, 61 Kan. 625, 60 Pac. 538; Stitzel v. Farley, 148 Ill. App. 635 (holding contract binding if made during a lucid interval). *See "Insane Persons," Dec. Dig. (Key-No.) §§ 26, 73; Cent. Dig. §§ 36, 136.*

[32] Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414; HOVEY v. HOBSON, 53 Me. 451, 89 Am. Dec. 705, Throckmorton, Cas. Contracts, 149; Fitzgerald v. Reed, 9 Smedes & M. (Miss.) 94; Sullivan v. Flynn, 20 D. C. 396; Brigham v. Fayerweather, 144 Mass. 52, 10 N. E. 735; Orr v. Mortgage Co., 107 Ga. 499, 33 S. E. 708; Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276, 40 Am. St Rep. 468; Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[33] Seaver v. Phelps, supra. *See "Insane Persons," Dec. Dig. (Key-No.) §§ 61, 73; Cent. Dig. §§ 98, 99, 125.*

[34] But if the other party did not act in good faith or had reasonable ground to believe the insane person incompetent, the contract may be avoided, although the consideration cannot be returned. Smith's Committee v. Forsythe, 90 S. W. 1075, 28 Ky. Law Rep. 1034. Knowledge that a person is an invalid and cannot write with his own hand does not of itself constitute notice of unsoundness. Groff v. Stitzer, 77 N. J. Eq. 260, 77 Atl. 46. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

tion." [35] This case has been expressly followed and applied in a number of our courts, while others, though not citing it, have laid down the same doctrine.[36] Under this rule the burden of proof is on the insane person to show his incapacity, and upon the other party to show his ignorance of such incapacity and his good faith and fair dealing.[37]

The distinctions between executory and executed contracts however, suggested in Molton v. Camroux, appear to have been repudiated in England, and in that country the more recent rule appears to be that the contract of a lunatic is binding unless the other party knew of his condition.[38]

The doctrine thus stated, however, is not to be applied as a technical rule in all cases. "The cases will disclose," it has been said, "that one dealing with an insane person, and not knowing his condition, or any facts to put him on his guard, will be protected by the courts of law and equity against such person's repudiating his contract on the ground of his mental incapacity. But the rule is not a technical one, to be relied on at all times and under all circumstances. It is applied in each case only to prevent a wrong being done, and is based on the principle that 'the law will not permit the lunatic's infirmity to be made an instrument of fraud.'" [39]

[35] Molton v. Camroux, 2 Exch. 489, 4 Exch. 17. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[36] Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716; MUTUAL LIFE INS. CO. v. HUNT, 79 N. Y. 541, Throckmorton, Cas. Contracts, 153; Ingraham v. Baldwin, 9 N. Y. 45; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Lincoln v. Buckmaster, 32 Vt. 652; Young v. Stevens, 48 N. H. 136, 2 Am. Rep. 202, 97 Am. Dec. 592; Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911; Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115; Shoulters v. Allen, 51 Mich. 529, 16 N. W. 888; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Burnham v. Kidwell, 113 Ill. 425; Scanlan v. Cobb, 85 Ill. 296; Northwestern Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Beals v. See, 10 Pa. 56, 49 Am. Dec. 573; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Myers v. Knabe, 51 Kan. 720, 33 Pac. 602; Harrison v. Otley, 101 Iowa, 652, 70 N. W. 724; Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; McKenzie v. Donnell, 151 Mo. 431, 52 S. W. 214; Jamison v. Culligan, 151 Mo. 410, 52 S. W. 224. If, however, the lunatic has received no benefit under the contract, it has been said that he can recover what he has parted with, notwithstanding the other party's good faith. Lincoln v. Buckmaster, 32 Vt. 658; Van Patton v. Beals, 46 Iowa, 63. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[37] Ipock v. Atlantic & N. C. R. Co., 158 N. C. 445, 74 S. E. 352. *See "Insane Persons," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 6.*

[38] Imperial Loan Co. v. Stone [1892] 1 Q. B. 599. See Anson, Cont. (8th Ed.) 120. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

[39] Knowlton's Anson, Cont. 116, note.

SAME—RATIFICATION AND AVOIDANCE

118. The voidable contract of a person non compos mentis may be ratified or avoided by himself when sane, or by his guardian during insanity, or by his representatives or heirs after his death.

119. The right to disaffirm is personal, and neither the other party nor third persons can avoid it.

120. In a few jurisdictions, although the other party did not know of the insanity and the contract was fair, the consideration received by the insane person need not be returned as a condition precedent to avoidance if he is unable to return it.

121. The contract can be avoided as against bona fide purchasers.

The voidable contracts of a person non compos mentis may be ratified or disaffirmed by him when he becomes sane, or during a lucid interval;[40] or, during the continuance of his infirmity, by his committee or guardian;[41] or, after his death, by his personal representative,[42] or his heirs.[43] The privilege is personal to the insane person, or those who thus represent him; and neither the other party to the contract nor third persons can avoid it.[44] Ratification or disaffirmance need not be in express words, but may be by conduct, as in the case of ratification or disaffirmance by a person of a

[40] Allis v. Billings, 6 Metc. (Mass.) 416, 39 Am. Dec. 744; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Arnold v. Iron Works, 1 Gray (Mass.) 434; Turner v. Rusk, 53 Md. 65. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 138, 141.*

[41] Moore v. Hershey, 90 Pa. 196; Halley v. Troester, 72 Mo. 73; McClain v. Davis, 77 Ind. 419. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 138, 141.*

[42] Beverley's Case, 4 Coke, 123b; Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479; Schuff v. Ransom, 79 Ind. 458; Orr v. Mortgage Co., 107 Ga. 499, 33 S. E. 708. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 138, 141.*

[43] HOVEY v. HOBSON, 53 Me. 451, 89 Am. Dec. 705, Throckmorton, Cas. Contracts, 149; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Schuff v. Ransom, 79 Ind. 458. *See "Insane Persons," Dec. Dig. (Key-No.) §§ 67, 79; Cent. Dig. §§ 103, 138, 141.*

[44] Carrier v. Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309; ante, p. 228, note 28. Contra, Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642. Sureties are liable on a note executed by an insane person. Lee v. Yandell, 69 Tex. 34, 6 S. W. 665. Only privies in blood or legal representatives can avoid. Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 138, 141.*

contract made during infancy.[45] And a contract once duly ratified may not afterwards be disaffirmed.[46]

Return of Consideration on Avoidance

In those jurisdictions where an insane person's contract is voidable, whether it is executed or not, and whether or not the other party acted in good faith and in ignorance of his infirmity, a person is not required to restore, or offer to restore, the consideration received by him as a condition precedent to the avoidance of a contract made by him while insane. "If the law required restoration of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly, and the great purpose of the law in avoiding such contracts—the protection of those who cannot protect themselves—defeated." [47]

As we have already seen, however, most courts do not allow an insane person to avoid his contracts where the other party acted in good faith, and in ignorance of his insanity, and cannot be placed in statu quo. Where this doctrine prevails, if the contract was made in good faith and without knowledge of the insanity, the right to avoid is conditional on return of the consideration.[48]

Avoidance as against Third Persons

The fact that third persons have acquired an interest under the contract of a person non compos mentis, in good faith, for value, and without notice of his infirmity, cannot defeat his right to avoid

[45] Gibson v. Soper, 6 Gray (Mass.) 283, 66 Am. Dec. 414; Arnold v. Iron Works, 1 Gray (Mass.) 434; Whitcomb v. Hardy, 73 Minn. 285, 76 N. W. 29. Cf. Beasley v. Beasley, 180 Ill. 163, 54 N. E. 187. Disaffirmance by action to avoid. Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. 80. Ratification is established by evidence of conduct which can reasonably be accounted for only on the hypothesis that he had chosen to recognize the contract as binding upon him and to retain as his own the property he had acquired under it. Newman v. Taylor (Tex. Civ. App.) 122 S. W. 425. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 138, 141.*

[46] Newman v. Taylor (Tex. Civ. App.) 122 S. W. 425. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. §§ 138, 141.*

[47] Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414. See, also, HOVEY v. HOBSON, 53 Me. 453, 89 Am. Dec. 705, Throckmorton, Cas. Contracts, 149. *See "Insane Persons," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 138.*

[48] West v. Seaboard Air Line Ry., 151 N. C. 231, 65 S. E. 979 [cit. Clark on Contracts (2d Ed.) 185]. And see cases cited supra, note 36. Contract may be avoided upon return of the consideration notwithstanding the fairness of the other party and his want of notice of the insanity. Nutter v. Des Moines Life Ins. Co. (Iowa) 136 N. W. 891. *See "Insane Persons," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 125.*

the contract.[49] This rule applies to deeds[50] and negotiable instruments[51] as well as to other contracts, and it applies whether the contract be regarded as void or merely voidable. To protect bona fide purchasers in such cases would be to withdraw protection from the insane person.

DRUNKEN PERSONS

122. A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable at his option, except that—

EXCEPTIONS—He is liable on contracts created by law, or quasi contracts.

123. The rules as to ratification and avoidance are substantially the same as in the case of infants and insane persons, except that some (but not all) courts hold that the contract cannot be avoided as against a bona fide purchaser.

The modern law places a drunken person, in respect of his capacity to contract, in the same position as an insane person.[52] If his drunkenness is so excessive as to render him incapable of comprehending the nature and effect of his contract, it is voidable at his option, and it is immaterial that his drunkenness was voluntary, and not procured through the circumvention of the other party.[53] In the absence of fraud, slight intoxication does not affect the va-

[49] HOVEY v. HOBSON, 53 Me. 451, 89 Am. Dec. 705, Throckmorton, Cas. Contracts, 149; Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Long v. Fox, 100 Ill. 43; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512. *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. § 94.*

[50] HOVEY v. HOBSON, supra; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512. In North Carolina it is held that the deed of a lunatic, duly recorded, cannot be avoided as against bona fide purchasers. Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686. *See "Insane Persons," Dec. Dig. (Key-No.) § 61; Cent. Dig. § 94.*

[51] Sentance v. Pool, 3 C. & P. 1; Anglo-Californian Bank v. Ames (C. C.) 27 Fed. 727; Wirebach's Ex'r v. Bank, 97 Pa. 543, 39 Am. Rep. 821; McClain v. Davis, 77 Ind. 419. *See "Insane Persons," Dec. Dig. (Key-No.) § 77; Cent. Dig. § 131.*

[52] For history of the doctrine in regard to drunkenness as ground of incapacity to contract, see Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440 and note. *See "Contracts," Dec. Dig. (Key-No.) § 92; Cent. Dig. §§ 412, 414; "Drunkards," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 7.*

[53] BARRETT v. BUXTON, 2 Aikens (Vt.) 167, 16 Am. Dec. 691, Throckmorton, Cas. Contracts, 155; Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; Miller v. Finley, 26 Mich. 254, 12 Am. Rep. 306;

lidity of a contract. According to some of the older cases, the intoxication must be so excessive as utterly to deprive the party of his reason and understanding;[54] but this doctrine has been very generally repudiated or modified, and the more reasonable one adopted that if the party is so far deprived of his reason and understanding as to render him incapable of understanding the nature and consequences of his contract, it is sufficient.[55]

The contract, though voidable at the option of the drunken person, is binding on the other party, and cannot be attacked by third persons.[56] By the weight of authority, if a person has been judicially declared incapable of conducting his own affairs by reason of habitual drunkenness, and has been put in the custody and under the control of a committee or guardian, his contracts are absolutely void.[57]

Gore v. Gibson, 13 Mees. & W. 623; Caulkins v. Fry, 35 Conn. 170; Johns v. Fritchey, 39 Md. 258; Bush v. Breinig, 113 Pa. 310, 6 Atl. 86, 57 Am. Rep. 469; Foss v. Hildreth, 10 Allen (Mass.) 76; Matthews v. Baxter, L. R. 8 Exch. 132; Shackelton v. Sebree, 86 Ill. 616; Bates v. Ball, 72 Ill. 108; Mansfield v. Watson, 2 Iowa, 111; Warnock v. Campbell, 25 N. J. Eq. 485; French's Heirs v. French, 8 Ohio, 214, 31 Am. Dec. 441; Cummings v. Henry, 10 Ind. 109; Reynolds v. Waller's Heirs, 1 Wash. (Va.) 164; Newell v. Fisher, 11 Smedes & M. (Miss.) 431, 49 Am. Dec. 66; Broadwater v. Darne, 10 Mo. 277; Phelan v. Gardner, 43 Cal. 306; Birmingham Ry., Light & Power Co. v. Hinton, 158 Ala. 470, 48 South. 546 (mental incapacity resulting from administration of drugs and opiates). But see Reinskopf v. Rogge, 37 Ind. 207. In Hunter v. Tolbard, 47 W. Va. 258, 34 S. E. 737, it is held that the contract is void. It has been held that a person who, when sober, agrees to sign a contract, cannot avail himself of intoxication at the time of signature as a defense. Page v. Krekey, 63 Hun, 629, 17 N. Y. Supp. 764. Cf. Youn v. Lamont, 56 Minn. 216, 57 N. W. 478.

[54] Johnson v. Phifer, 6 Neb. 401; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; Belcher v. Belcher, 10 Yerg. (Tenn.) 121. *See "Contracts," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 414.*

[55] J. I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970. Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271; Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532 [cit. Clark on Contracts (2d Ed.) 186]; Van Wyck v. Brasher, 81 N. Y. 260; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; Willcox v. Jackson, 51 Iowa, 208, 1 N. W. 513; Van Horn v. Keenan, 28 Ill. 445; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440 and note [quot. Clark on Contracts (1st Ed.) pp. 274, 275]. And see cases cited in note. *See "Contracts," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 414.*

[56] Matthews v. Baxter, L. R. 8 Exch. 132; Eaton's Adm'r v. Perry, 29 Mo. 96. *See "Drunkards," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 7.*

[57] Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; Philadelphia Trust, Safe & Deposit Ins. Co. v. Allison, 108 Me. 326, 80 Atl. 833, 39 L. R. A. (N. S.) 39; Ralph v. Taylor, 33 R. I. 503, 82 Atl. 279. This is true even of a

A person who was drunk, but not under guardianship, when he entered into a contract, may either avoid or ratify it when sober;[58] and ratification or disaffirmance may be by conduct showing an intention to ratify or to avoid it, as by retention of the consideration, after becoming sober, or failure to disaffirm for an unreasonable time.[59] Having ratified the contract, he cannot retract and avoid it.[60] On avoidance he must return or offer to return the consideration received by him,[61] though, if the consideration were wasted before becoming sober, this would probably not be required.[62]

A drunken person is liable on contracts created by law, or quasi contracts, and is liable for necessaries furnished him.[63]

As to whether drunkenness is a defense against persons in good faith acquiring rights for value under the contract,—as, for instance, against the bona fide holder of a negotiable instrument,—the authorities are conflicting. Some courts hold that total, but not partial, drunkenness, is a defense,[64] but, by the decided weight of authority, not even total drunkenness is a defense against a holder in due course of a negotiable instrument.[65]

negotiable instrument in the hands of a bona fide purchaser for value. Wadsworth v. Sharpsteen, supra. This does not apply to contracts for necessaries. McCrillis v. Bartlett, 8 N. H. 569; nor to a contract made before the appointment of the committee. Appeal of Donehoo (Pa.) 15 Atl. 924. *See "Drunkards," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 7.*

[58] See cases cited in note 53, supra. It may be avoided by his personal representatives. Wigglesworth v. Steers, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602. *See "Contracts," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 412.*

[59] Williams v. Inabnet, 1 Bailey (S. C.) 343; Reinskopf v. Rogge, 37 Ind. 207; Smith v. Williamson, 8 Utah, 219, 30 Pac. 753; Mansfield v. Watson, 2 Iowa, 111. *See "Contracts," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 412.*

[60] Matthews v. Baxter, L. R. 8 Exch. 132; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377. *See "Contracts," Dec. Dig. (Key-No.) §§ 92, 97; Cent. Dig. §§ 412, 443.*

[61] Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Birmingham Ry., Light & Power Co. v. Hinton, 158 Ala. 470, 48 South. 546. *See "Contracts," Dec. Dig. (Key-No.) §§ 92, 97; Cent. Dig. §§ 412, 442–446.*

[62] Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486. *See "Contracts," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 442–446; "Cancellation of Instruments," Dec. Dig. (Key-No.) § 24; Cent. Dig. §§ 33–38.*

[63] Gore v. Gibson, 13 Mees. & W. 623; McCrillis v. Bartlett, 8 N. H. 569. *See "Contracts," Dec. Dig. (Key-No.) § 92; Cent. Dig. § 412.*

[64] Caulkins v. Fry, 35 Conn. 170. *See "Bills and Notes," Dec. Dig. (Key-No.) § 366; Cent. Dig. §§ 945, 946.*

[65] State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246; McSparran v. Neeley, 91 Pa. 17; Smith v. Williamson, 8 Utah, 219, 30 Pac. 753. See Norton, Bills & N. (3d Ed.) 232; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306. And see Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731, holding that a guaranty is enforceable against a drunken person by an innocent party to whom it is addressed and who has acted upon it to his

pass, like other personalty of the wife, into the estate of the husband, but survive to the wife if she outlives him, or pass to her personal representatives if she dies in his lifetime.

The wife of a man who was civilly dead by reason of his being under conviction of a felony had the same capacity to contract as a feme sole.[76] The old common-law doctrine of civil death from conviction of a felony, however, is not recognized in this country; but there are, in some states, statutes declaring that a man who is under a sentence of imprisonment in the penitentiary for life shall be deemed civilly dead.[77]

Where, however, a husband deserts his wife absolutely and completely, and leaves the state, it is generally held in this country that the wife may contract and sue and be sued as a feme sole.[78] At common law, however, such desertion must be more than a mere separation of the husband from his wife—it must be a voluntary abandonment of her, with intent to renounce the marital relation, so far as he can do so, and to leave his wife to act as a feme sole.[79]

Same—In Equity

In equity a married woman may have property settled upon her to her separate use, in which case she may dispose of it in the same manner as if she were a feme sole. In the exercise of this right, she may charge it with the liability to satisfy contracts made by her; and an engagement or security entered into by her, showing an intention to charge her separate property, will have that effect.[80] As

[76] Co. Litt. 132b; Hatchett v. Baddeley, 2 W. Bl. 1079, 1082; Carrol v. Blencow, 4 Esp. 27. Civil death arose formerly in England also from outlawry. As to other exceptions not material in this country, see Anson, Cont. (8th Ed.) 122; Pollock, Cont. (3d Ed.) 80. As to agreements of separation, see Tiffany, Pers. & Dom. Rel. 168. *See "Husband and Wife," Dec. Dig. (Key-No.) §§ 65–67; Cent. Dig. §§ 285–289.*

[77] See ante, p. 184.

[78] GREGORY v. PIERCE, 4 Metc. (Mass.) 478, Throckmorton Cas. Contracts, 159; Mead v. Hughes' Adm'r, 15 Ala. 141, 1 Am. Rep. 123; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686. See Rogers v. Phillips, 8 Ark. 366, 47 Am. Dec. 727. See Metc. Cont. 98 et seq. A married woman whose husband is an alien, and has never been in the United States, is liable on her contracts. Levi v. Marsha, 122 N. C. 565, 29 S. E. 832. *See "Husband and Wife," Dec. Dig. (Key-No.) §§ 65–67; Cent. Dig. §§ 285–289.*

[79] GREGORY v. PIERCE, supra. *See "Husband and Wife," Dec. Dig. (Key-No.) §§ 65–67; Cent. Dig. §§ 285–289.*

[80] See Hulme v. Tenant, 1 Brown, Ch. 16; Shattock v. Shattock, L. R. 2 Eq. 182; Jaques v. Methodist Church, 17 Johns. (N. Y.) 549, 8 Am. Dec. 447; Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Hollis v. Francois, 5 Tex. 195, 51 Am. Dec. 760; Bradford v. Greenway, 17 Ala. 797, 52 Am. Dec. 203; Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Rogers v. Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710; Smith v. Thompson, 2 MacArthur

said in an English case: "Courts of equity have, through the medium of trusts, created for married women rights and interests in property, both real and personal, separate and independent of their husbands. To the extent of the rights and interests thus created a married woman has, in courts of equity, power to alienate, to contract, to enjoy. She is considered a feme sole in respect of property thus settled or secured to her separate use." [81] It is presumed in general that a contract or engagement made by a married woman in writing imports an intention to charge her separate estate, otherwise the writing would have no meaning. If not in writing, it must be proved that the engagement was entered into with such an intention.[82] Under this rule, bonds, bills of exchange, and promissory notes of a married woman are presumptively payable out of her separate estate.[83] It is very generally held that, where a debt contracted by a married woman is for the benefit of her separate estate, it will be chargeable in equity for the payment thereof, without regard to her intention.[84]

There are some limitations on the power of a married woman in respect to her separate property which should be noticed. She

(D. C.) 291, 29 Am. Rep. 621; Priest v. Cone, 51 Vt. 495, 31 Am. Rep. 695; Willard v. Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142; Burch v. Breckinridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Kantrowitz v. Prather, 31 Ind. 92, 99 Am. Dec. 587; Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Baker v. Gregory, 28 Ala. 544, 65 Am. Dec. 366. See Tiffany, Pers. & Dom. Rel. 131 et seq. *See "Husband and Wife," Dec. Dig. (Key-No.) § 152; Cent. Dig. §§ 596–602.*

[81] Johnson v. Gallagher, 3 De Gex, F. & J. 494. *See "Husband and Wife," Dec. Dig. (Key-No.) § 152; Cent. Dig. §§ 596–602.*

[82] Leake, Cont. 238; Kantrowitz v. Prather, 31 Ind. 92, 99 Am. Dec. 587; Burch v. Breckinridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Litton v. Baldwin, 8 Humph. (Tenn.) 209, 47 Am. Dec. 605; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142. *See "Husband and Wife," Dec. Dig. (Key-No.) § 164; Cent. Dig. §§ 641–648.*

[83] Tullett v. Armstrong, 4 Beav. 319; Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Burch v. Breckinridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 423; Rogers v. Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710. *See "Husband and Wife," Dec. Dig. (Key-No.) §§ 156, 164, 232; Cent. Dig. §§ 608–622, 641–648, 844.*

[84] Willard v. Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Rogers v. Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710; James v. Mayrant, 4 Desaus. Eq. (S. C.) 591, 6 Am. Dec. 630; Yale v. Dederer, 22 N. Y. 450, 78 Am. Dec. 216; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142; Dyett v. Coal Co., 20 Wend. (N. Y.) 570, 32 Am. Dec. 598; Dale v. Robinson, 51 Vt. 20, 31 Am. Rep. 669; Patrick v. Littell, 36 Ohio St. 79, 38 Am. Rep. 552; McCormick v. Holbrook, 22 Iowa, 487, 92 Am. Dec. 400. Liability for medical attendance and funeral expenses. McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814. *See "Husband and Wife," Dec. Dig. (Key-No.) § 162; Cent. Dig. §§ 322, 596, 600, 614, 637–640.*

cannot sue or be sued alone in respect of the separate estate. She does not acquire a sort of equitable status of capacity to contract debts in respect of her separate estate, without regard to when it is acquired. She can only bind such separate estate as is in her possession or control at the time the liabilities accrue. She cannot bind herself nor create liabilities in excess of her estate. Her creditor's remedy is not against her, but against her property.[85]

Same—Disability Removed by Statute

The common law has of late years been almost universally changed by statutes both in this country and in England. The statutes vary so much in the different states that it would be impracticable to attempt to state the law in detail. In general, however, it may be said that by the statutes married women have been given power to contract as if femes sole, subject to certain specified exceptions, such as contracts for the sale or conveyance of their real estate, or as surety for their husbands.

CORPORATIONS

125. A corporation, by reason of its artificial nature, can only contract through a duly-authorized agent.

126. Formerly, with certain exceptions, it could only contract under its corporate seal; but now, unless restricted by its charter or by statute, it may contract in the same manner as a natural person.

127. The power of a corporation to enter into a contract is limited in respect of the subject-matter only by its charter or act of incorporation or by other statutes binding on it. Except as so restricted, it has the implied power to enter into any contract which is reasonably incidental to the accomplishment of the objects for which it is created.

128. An attempted contract, which is not within the powers of a corporation, is said to be ultra vires, and in many jurisdictions is held to be void, so that it cannot be enforced; but in other jurisdictions the defense of ultra vires is excluded when the contract has been performed by the party seeking to enforce it, and it would be inequitable to allow the defense.

[85] Picard v. Hire, 5 Ch. App. 277. *See "Husband and Wife," Dec. Dig. (Key-No.) § 215; Cent. Dig. § 784.*

A corporation can contract only by means of an agent. It "cannot act in its own person, for it has no person." [86] It cannot act through one or any number of its members, merely as such, for, though they compose the corporation, they are not the corporation. It must act through an agent expressly authorized to act for it.[87]

Mode of Contracting—Seal

It was formerly the rule, subject to some exceptions, that a corporation could manifest its intention and act only by the use of its corporate seal;[88] but this doctrine is no longer recognized in this country. Unless the charter or act of incorporation or some statute provides otherwise, it need only use a seal where an individual would be required to use one. In all cases where it is not expressly so restricted, it may, like a natural person, contract under seal, or by writing not under seal, or orally.[89] Like a natural person, also, it can ratify any contract made by an agent which it could have authorized the agent to make,[90] and it may be liable on contracts implied as a fact from corporate acts,[91] and on quasi contractual obligations.[92]

If the charter or act of incorporation, or any other statute, expressly prescribes a certain mode or form for entering into contracts, as is frequently the case, that form and mode must be strict-

[86] Per Lord Cairns, in Ferguson v. Wilson, 2 Ch. 99. *See "Corporations," Dec. Dig. (Key-No.) §§ 398, 406, 447; Cent. Dig. §§ 1592–1594, 1611–1614, 1786, 1787, 1807.*

[87] Anonymous, 12 Mod. 423; Bank of Ireland v. Evans Charities, 5 H. L. Cas. 389. *See "Corporations," Dec. Dig. (Key-No.) §§ 383, 406; Cent. Dig. §§ 1611–1614.*

[88] 1 Bl. Comm. 475; Church v. Gas Co., 6 Adol. & E. 846. *See "Corporations," Dec. Dig. (Key-No.) § 455; Cent. Dig. §§ 1801–1803.*

[89] Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. Ed. 351; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552; Topping v. Bickford, 4 Allen (Mass.) 120; Goodwin v. Screw Co., 34 N. H. 378; Pixley v. Railroad Co., 33 Cal. 183, 91 Am. Dec. 623; Regents of University of Michigan v. Society, 12 Mich. 138; Board of Education of Illinois v. Greenbaum, 39 Ill. 609; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 530; Trustees of Christian Church of Wolcott v. Johnson, 53 Ind. 273; Clark, Corp. 156. *See "Corporations," Dec. Dig. (Key-No.) § 455; Cent. Dig. §§ 1801–1803.*

[90] Peterson v. Mayor, etc., 17 N. Y. 450. *See "Corporations," Dec. Dig. (Key-No.) § 426; Cent. Dig. §§ 1596, 1702–1716.*

[91] Proprietors of the Canal Bridge v. Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. Ed. 351. *See "Corporations," Dec. Dig. (Key-No.) § 451; Cent. Dig. § 1787.*

[92] Bank of Columbia v. Patterson, 7 Cranch, 299. 3 L. Ed. 351; Hall v. Mayor of Swansea, 5 Q. B. 526; Jefferys v. Gurr, 2 Barn. & Adol. 833; Seagraves v. City of Alton, 13 Ill. 366; Trustees of Cincinnati Tp. v. Ogden, 5 Ohio, 23. *See "Corporations," Dec. Dig. (Key-No.) §§ 447, 451; Cent. Dig. §§ 1786, 1787.*

ly followed.[92] The statutory provision, however, must be mandatory, and not merely directory.[94]

What Contracts are Authorised

The power of a corporation to enter into contracts is limited, in respect of the matter of the contract, by the charter or act of incorporation, and by other statutes binding upon it. Being a creature of the legislature, it may make only such contracts as are expressly or impliedly authorized by the legislature.[95] It exists for no other purpose, and has no greater powers, than are conferred by its creation.

By implication a corporation is given power, in the absence of express restriction in its charter, to enter into any contract which is necessary and usual in the course of business, or reasonably incident to the accomplishment of the objects for which it was created.[96]

To borrow money for carrying on its business, and to give a mortgage to secure its debts, to receive or give negotiable paper, to buy and sell land, are all acts within the power of the corporation if it is acting within its proper sphere, and in carrying out the purposes for which it was incorporated; but not otherwise.[97]

Ultra Vires Contracts

A contract made by a corporation ultra vires—that is, beyond the powers of the corporation executing it—is in many jurisdictions held to be void, so that no action can be brought upon it.[98] In accordance with this view, the contract being absolutely void, it may

[92] Head v. Insurance Co., 2 Cranch, 127, at page 169, 2 L. Ed. 229; Bissell v. Spring Valley Tp., 110 U. S. 162, 3 Sup. Ct. 555, 28 L. Ed. 105. *See "Corporations," Dec. Dig. (Key-No.) § 452; Cent. Dig. §§ 1796–1805.*

[94] Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Witte v. Fishing Co., 2 Conn. 260; Bulkley v. Same, 2 Conn. 252, 7 Am. Dec. 271. *See "Corporations," Dec. Dig. (Key-No.) § 452; Cent. Dig. §§ 1796–1805.*

[95] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Throckmorton Cas. Contracts, 161. *See "Corporations," Dec. Dig. (Key-No.) §§ 449, 450; Cent. Dig. §§ 1786, 1793–1795.*

[96] DOWNING v. MT. WASHINGTON ROAD CO., supra; Morville v. Society, 123 Mass. 129, 25 Am. Rep. 40; Union Bank v. Jacobs, 6 Humph. (Tenn.) 515; London & N. W. Ry. Co. v. Price, 11 Q. B. D. 485; Simpson v. Hotel Co., 8 H. L. Cas. 712; Ft. Worth City Co. v. Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167. *See "Corporations," Dec. Dig. (Key-No.) § 447; Cent. Dig. §§ 1786–1807.*

[97] Clark, Corp 133 et seq.

[98] DOWNING v. MT. WASHINGTON ROAD CO., 40 N. H. 230, Throckmorton Cas. Contracts, 161; East Anglian Rys. Co. v. Railway Co., 11 C. B. 775; Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; Pearce v. Railroad Co., 21 How. 441, 16 L. Ed. 184; Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Central Transp. Co. v. Car Co., 139

not even be ratified.[99] In many states, on the other hand, the defense of ultra vires is in such cases excluded, whether interposed for or against the corporation, on the ground of an equitable estoppel, when the contract has been wholly or partly performed on the part of the plaintiff, and it would be inequitable to allow the defense.[100] And as a rule, in all jurisdictions, where either party has received benefits under the contract in the form of money, property, or services, an action quasi ex contractu may be maintained to recover it.[101] A discussion of the law of corporations in relation to contracts is, however, beyond the scope of this book.[102]

U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 65; California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. *See "Corporations," Dec. Dig. (Key-No.) § 487; Cent. Dig. §§ 1893–1898.*

[99] DOWNING v. MT. WASHINGTON ROAD CO., supra. *See "Corporations," Dec. Dig. (Key-No.) § 487; Cent. Dig. §§ 1893–1898.*

[100] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Holmes & Griggs Mfg. Co. v. Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Day v. Buggy Co., 57 Mich. 151, 23 N. W. 628, 58 Am. Rep. 352; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; Seymour v. Society, 54 Minn. 147, 55 N. W. 907; Manchester & L. R. Co. v. Railroad Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; Union Hardware Co. v. Manufacturing Co., 58 Conn. 219, 20 Atl. 455. *See "Corporations," Dec. Dig. (Key-No.) § 487; Cent. Dig. §§ 1893–1898.*

[101] Day v. Buggy Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; Davis v. Railroad Co., 131 Mass. 258, 41 Am. Rep. 221; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; Nashua & L. R. Corp. v. Railroad Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454; Anthony v. Machine Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575; Moore v. Tanning Co., 60 Vt. 459, 15 Atl. 114. *See "Corporations," Dec. Dig. (Key-No.) § 487; Cent. Dig. §§ 1893–1898.*

[102] See Clark, Corp. 170 et seq.

CHAPTER VII

REALITY OF CONSENT

129. In General.
130–131. Mistake.
132–134. Effect—Remedies.
135–138. Misrepresentation.
139. Fraud.
140–141. Effect—Remedies.
142–144. Duress.
145–146. Undue Influence.

IN GENERAL

129. The mutual consent which is essential to every agreement must be real. There may be no real consent, and therefore no contract, because of

(a) Mistake,
(b) Misrepresentation,
(c) Fraud,
(d) Duress, or
(e) Undue influence.

The next feature in the formation of contract to be considered is genuineness or reality of consent. If we have an apparent agreement possessing the element of form or consideration, or both, and made between parties capable of contracting, we must ask whether the consent of both or either of the parties was given under such circumstances as to make it no real expression of their intention.

There may be various causes for unreality of consent: (1) The parties may not have meant the same thing; or one or both, while meaning the same thing, may have formed untrue conclusions as to the subject-matter of the agreement. This is Mistake. (2) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the agreement by statements innocently made, or facts innocently withheld by the other. This is Misrepresentation. (3) These untrue conclusions may have been induced by intentional misrepresentations or active concealment by the other party, or intentional concealment where there was a duty to disclose, for the purpose of deceiving. This is Fraud. (4) The consent of one of the parties may have been

extorted from him by the other by actual or threatened violence This is Duress. (5) Circumstances may have rendered one of the parties morally incapable of resisting the will of the other, so that his consent was no real expression of intention. This is Undue Influence.[1]

MISTAKE

130. Mistake is where the parties did not mean the same thing, or where one or both, while meaning the same thing, formed untrue conclusions as to the subject-matter of the agreement.

131. Mistake avoids the contract in the following cases:

(a) Where the mistake is as to the nature of a written contract. the execution of which is induced or procured by misrepresentation;

(b) Where the mistake is as to the identity of the person with whom the contract is made;

(c) Where the subject-matter of the contract, unknown to the parties, does not exist;

(d) Where two things have the same name, and the parties, owing to the identity of names, do not mean the same subject-matter.

It must be borne in mind that we are here dealing with mistake of intention, and not mistake of expression. The parties may be genuinely agreed on the terms of their contract, but the terms may, by mistake, be so expressed as not to convey their meaning. In these cases they may be permitted to explain the contract, or the court may correct the mistake. This is mistake of expression, and pertains to the interpretation of contracts, with which we shall deal in a subsequent chapter.[2]

The almost universal rule is that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression. If he has exhibited all the outward signs of agreement, the law will hold that he has agreed. As a rule, a person cannot avoid his contract simply by showing that he has made a mistake.[3] There are, how-

[1] Anson, Cont. (8th Ed.) 127.

[2] See post, ch. X.

[3] C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773, holding mistake without effect where it was the mistake of only one party and was not induced by, or actually known to, the other. To the same effect, see Tatum v. Coast Lumber Co., 16 Idaho, 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109; Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117

ever, exceptions to this general rule in the case of mutual mistake of the parties, and of mistake of one party induced by, or known to, the other. The latter is a species of fraud, and is accordingly reserved for treatment under that topic.[4]

"Mutual mistake," as defined in a Minnesota case,[5] "consists in a clear showing of a misunderstanding, reciprocal and common to both parties, in respect to the terms and subject-matter of the contract, or some substantive part thereof." It should not be understood that mutual mistake is always sufficient to render a contract void. Where the mistake is in regard to an immaterial matter, or a mere matter of inducement, it is without effect upon the validity of the contract.[6] But where the mistake goes to the essence of the contract, it renders the contract void for the want of a meeting of the minds of the parties, or because the apparent agreement is upon the assumption of that which is not true. The circumstances under which mistake renders the contract void will now be enumerated and explained.

Mistake as to the Nature of the Transaction—Written Instrument

There are cases in which a contract is void because of a mistake as to the nature of the transaction. Such cases arise in the execution of written instruments, and must arise almost of necessity from misrepresentation, either of a third person or of the other party. A man who has executed an instrument cannot avoid its operation by saying that he did not put his mind to it or that he did not suppose it would have any legal effect.[7] He must have been induced to execute it by some deceit or misrepresentation

Am. St. Rep. 224; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255. *See "Contracts," Dec. Dig. (Key-No). § 93; Cent. Dig. §§ 415–419.*

[4] See post, p. 270.

[5] C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[6] Darnell v. Dolan (Tex. Civ. App.) 132 S. W. 857; Stewart v. Ticonic Nat. Bank, 104 Me. 578, 72 Atl. 741. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[7] Hunter v. Walters, L. R. 7 Ch. 81; Cannon v. Lindsey, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38. And see Kennerty v. Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669; Little v. Little, 2 N. D. 175, 49 N. W. 736; Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155; Campbell v. Van Houten, 44 Mo. App. 231; Liska v. Lodge, 112 Mich. 635, 71 N. W. 171; Royston v. Miller (C. C.) 76 Fed. 50; Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437, 28 C. C. A. 358; Muller v. Kelly (C. C.) 116 Fed. 545; Sheneberger v. Union Cent. Life Ins. Co., 114 Iowa, 578, 87 N. W. 493, 55 L. R. A. 269; Martin v. Smith, 116 Ala. 639, 22 South. 917; Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; Fivey v. Pennsylvania R. Co., 67 N. J. Law, 627, 52 Atl. 472, 91 Am. St. Rep. 445. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

which ordinary diligence could not penetrate. Thus, where a man who is illiterate, or blind, or ignorant of the language, executes a deed, which is misread or misdescribed to him by the other party or a stranger, and the deed is in fact a different instrument from that which he was led to believe it to be, the deed is void.[8] But if a man can read and does not read the document which he signs,[9] or if, being unable to read, he signs without having it read,[10] he will not be heard to say that the contract is void, although in such case, if he was induced to sign it by fraudulent misrepresentation as to the character or terms, it is generally held that the contract is voidable.[11]

In a leading case, the acceptor of a bill of exchange had induced a person to indorse it by telling him that it was a guaranty, and the defendant signed on the faith of the representation without seeing the face of the bill. It was held that, if the defendant was not guilty of any negligence in so signing, the bill did not bind him, even in the hands of a bona fide purchaser for value. It seems "plain, on principal and on authority," said the court, "that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany

[8] Thoroughgood's Case, 2 Coke, 9; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Schuylkill Co. v. Copley, 67 Pa. 386, 5 Am. Rep. 441; Rockford, R. I. & St. L. R. Co. v. Shunick, 65 Ill. 223; Burlington Lumber Co. v. Lumber Co., 100 Iowa, 469, 69 N. W. 558; Sibley v. Holcomb, 104 Ky. 670, 47 S. W. 765. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[9] Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; In re Greenfield's Estate, 14 Pa. 489; J. I. Case Threshing Machine Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131. And see cases cited supra, note 7. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[10] Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437, 28 C. C. A. 338; Muller v. Kelly (C. C.) 116 Fed. 545. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[11] Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016; Griffin v. Roanoke Railroad & Lumber Co., 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463; Western Mfg. Co. v. Cotton & Long, 126 Ky. 749, 104 S. W. 758, 12 L. R. A. (N. S.) 427. And see post, p. 284. *See "Contracts," Dec. Dig. (Key-No.) § 98; Cent. Dig. § 447.*

the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended." [12]

In this case the contract was void, and therefore could not be enforced even by a bona fide holder.[1] And the case would have been the same had the execution been obtained, without negligence on the part of the signer, by the fraud of the other party.[13] In that case also the minds of the parties never meet, for the defrauded party thinks he is signing one instrument, and the defrauding party is aware that the signer is signing a different instrument. The case is, in effect, one of mistake, induced by fraud. If the ground of avoidance is the fraud of the other party, whereby the signer was induced to execute the instrument understandingly, the misrepresentation not relating to the character of the instrument, the contract, as we shall see, would be voidable, and not void.[14]

The absence of negligence is strongly dwelt upon by the court in the case above stated, and the jury had expressly negatived its existence. A person cannot assert the invalidity of a note or bill of exchange or deed, as against a bona fide purchaser for value, on the ground that through fraud and circumvention he was induced to sign, not knowing the nature of the instrument, unless he shows that he was not guilty of negligence; for if he was negligent he will be estopped from asserting the invalidity. If he shows this, but not otherwise, he may assert the invalidity

[12] FOSTER v. MACKINNON, L. R. 4 C. P. 704, 38 L. J. C. P. N. S. 310, 20 L. T. N. S. 887, 17 Wkly. Rep. 1105, Throckmorton, Cas. Contracts, 166. And see Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Kagel v. Totten, 59 Md. 447; Whitney v. Snyder, 2 Lans. (N. Y.) 477; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Puffer v. Smith, 57 Ill. 527; Soper v. Peck, 51 Mich. 563, 17 N. W. 57; De Camp v. Hamma, 29 Ohio St. 467; Trambly v. Ricard, 130 Mass. 259; Corby v. Weddle, 57 Mo. 452; Detwiler v. Bish, 44 Ind. 70; Baldwin v. Bricker, 86 Ind. 221; Hewitt v. Jones, 72 Ill. 218; Bowers v. Thomas, 62 Wis. 480, 22 N. W. 710; Schaper v. Schaper, 84 Ill. 603; Vanbrunt v. Singley, 83 Ill. 281; Esterly v. Eppelsheimer, 73 Iowa, 260, 34 N. W. 846; Wood v. Lock Co., 96 Ga. 120, 22 S. E. 909. *See "Bills and Notes," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 233–240.*

[13] McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Esterly v. Eppelsheimer, 73 Iowa, 260, 34 N. W. 846; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. Rep. 184; Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 1 L. R. A. (N. S.) 1075, 107 Am. St. Rep. 823 (signature obtained by trick). And see cases cited in note 12, supra, and note 15, infra. *See "Bills and Notes," Dec. Dig. (Key-No.) § 373; Cent. Dig. §§ 966–970.*

[14] Post, p. 295.

of the instrument, even as against a bona fide purchaser.[15] There are some cases which hold that a negotiable instrument cannot be avoided in the hands of a bona fide holder, even though there was no negligence;[16] but the great weight of authority is in favor of the rule above stated.

Mistake as to the Person with Whom the Contract is Made

A mistake as to the person with whom the contract is made may avoid it; as, for instance, where a contract is made with one person under a belief that it is being made with another. Where a man intends to contract with one person, another cannot make himself a party to the contract by substituting himself; for, in the first place, a man, in entering into a contract, looks to the credit and character of the person with whom he supposes he is contracting,[17] and, in the second place, the person who thus substitutes himself is never present in the mind of the other party, and the latter, therefore, does not consent to a contract with him. Where a man imitated another's signature, and thereby induced persons to supply him with goods under the belief that they were supplying the person whose signature was imitated, it was held that there was no contract with the person so procuring the goods. "Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between

[15] Chapman v. Rose, 56 N. Y. 138, 15 Am. Rep. 401; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118; Mackey v. Peterson, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211; Upton v. Tribilcock, 91 U. S. 50, 23 L. Ed. 203; Gavagan v. Bryant, 83 Ill. 376; Leach v. Nichols, 55 Ill. 273; Ross v. Doland, 29 Ohio St. 473; Douglass v. Matting, 29 Iowa, 498, 4 Am. Rep. 238; Fayette Co. Sav. Bank v. Steffes, 54 Iowa, 214, 6 N. W. 267; Millard v. Barton, 13 R. I. 601, 43 Am. Rep. 51; Baldwin v. Barrows, 86 Ind. 351; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Ort v. Fowler, 31 Kan. 478, 2 Pac. 380, 47 Am. Rep. 501; Weller's Appeal, 103 Pa. 594; Johnston v. Patterson, 114 Pa. 398, 6 Atl. 746; Shirts v. Overjohn, 60 Mo. 305; Citizens' Nat. Bank v. Smith, 55 N. H. 593. And see cases cited supra, note 13. *See "Bills and Notes," Dec. Dig. (Key-No.) § 373; Cent. Dig. §§ 966–970.*

[16] First Nat. Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506 (collecting cases). *See "Bills and Notes," Dec. Dig. (Key-No.) § 373; Cent. Dig. §§ 966–970; "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[17] Humble v. Hunter, 12 Q. B. 311; BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9, Throckmorton, Cas. Contracts, 305. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required." [18]

In this case the mistake was induced by fraud, but an innocent mistake may produce the same result. Thus, where an order for goods was sent to a particular person, and a man who had succeeded to his business filled the order without giving notice of the change, it was held that he could not recover the price of the goods. "In order to entitle the plaintiff to recover," it was said, "he must show that there was a contract with himself." [19] And on the same principle, if a man sells goods to another, representing that he is the owner, and the other party intends to buy from him, there is no contract with the real owner, who was the undisclosed principal of the seller, for "every man has a right to elect what parties he will deal with." [20] So, also, if a man obtains goods from another by falsely representing that he is the agent of another person, to whom the owner of the goods thinks he is selling them, the sale is void.[21] To render the sale void, however, there must

[18] CUNDY v. LINDSAY, L. R. 3 App. Cas. 465, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406, Throckmorton, Cas. Contracts, 169; post, p. 296. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[19] Boulton v. Jones, 2 Hurl. & N. 564. And see BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9, Throckmorton, Cas. Contracts, 305; Randolph Iron Co. v. Elliott, 34 N. J. Law, 184; Gregory v. Wendell, 40 Mich. 443; Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Fox v. Tabel, 66 Conn. 397, 34 Atl. 101. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[20] Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Mitchell v. Railton, 45 Mo. App. 273. It is not meant that an agent must always disclose his agency. An agent may sell the property of his principal without disclosing that he acts as agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. Huntington v. Knox, 7 Cush. (Mass.) 371. See Tiffany, Ag. 304–307. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[21] Hardman v. Booth, 1 Hurl. & C. 803; Hollins v. Fowler, L. R. 7 H. L. 757; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Hentz v. Miller, 94 N. Y. 67; Barker v. Dinsmore, 72 Pa. 427, 13 Am. Rep. 697; Edmunds v. Transportation Co., 135 Mass. 283; McCrillis v. Allen, 57 Vt. 505; Peters Box & Lumber Co. v. Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; Fifer v. Clearfield & Cambria Coal & Coke Co., 103 Md. 1, 62 Atl. 1122 (purchase by individual in name of fictitious corporation supposed by the seller to have a legal existence). So, also, where a person obtains goods by falsely representing that he is member of a firm, and gives in payment a forged check of the firm. Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394. So, also, where a person obtains goods by falsely representing that he is agent of an undisclosed principal. Rodliff v. Dollinger, 141 Mass. 1, 4 N. E.

be a false representation that the agency exists, and not merely belief in its existence on the part of the seller, and intent to sell to the supposed principal.[22]

Mistake as to Subject-Matter of Contract

If a man knows the nature of the transaction, and the party with whom he is entering into legal relations, it is, for the most part, his own fault if the subject-matter of the contract—the thing contracted for and the terms of the bargain—is not what he supposed. "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." [23] And so, if the parties are agreed in clear terms, and one of them does not get what he anticipates under the contract, this is, if anything, failure of performance, and not mistake. Cases cited in illustration of the rule that a man is not bound to accept a thing substantially different from that which he bargained for [24] have nothing to do with the formation of contract, and we must keep these questions of mistake and so-called failure of consideration clearly apart.

Mistake as to the subject-matter of a contract will only avoid it at law in a few cases. Equity, however, may grant relief in cases where the law may afford no remedy.[25]

Same—Mistake as to Existence of Subject-Matter

If the agreement is in respect of a thing which, unknown to both parties, does not exist at the time of entering into the contract, this goes to the very root of the matter, and avoids the contract. It seems that this rests upon the ground that the existence of the subject-matter is a condition of the contract, rather than upon the ground of mutual mistake.[26] The subject belongs with

805, 55 Am. Rep. 439. See, also, Paine v. Loeb, 96 Fed. 164, 37 C. C. A. 434; post, p. 296. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[22] Stoddard v. Ham, 129 Mass. 383, 37 Am. Rep. 369. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[23] Per Blackburn, J., in Smith v. Hughes, L. R. 6 Q. B. at page 607. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[24] Gompertz v. Bartlett, 2 El. & Bl. 849; Couder v. Hall, 26 B. (N. S.) 22. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[25] See Fritzler v. Robinson, 70 Iowa, 300, 31 N. W. 61; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Fleetwood v. Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; Thwing v. Lumber Co., 40 Minn. 184, 41 N. W. 815. *See "Contracts," Dec. Dig. (Key-No.) § 98; Cent. Dig. § 447.*

[26] See Anson, Cont. (8th Ed.) 135; Pollock, Cont. (3d Ed.) 386, 455.

impossibility of performance; but, inasmuch as the thing agreed upon has ceased to be possible before the agreement, such impossibility prevents a contract from ever arising, and does not operate, as impossibility arising subsequent to the agreement will sometimes operate, as a form of discharge. One of the leading English cases on this subject arose out of a sale of a cargo of corn which was supposed by the parties, at the time of the sale, to be on its voyage to England, but which, in fact, having become heated on the voyage, had been unloaded and sold. It was held that the contract was void, inasmuch as it "plainly imported that there was something which was to be sold at the time of the contract, and something to be purchased," whereas the object of the sale had ceased to exist.[27] So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it.[28] And so where the subject-matter of the contract is a right or title which, unknown to the parties, does not exist.[29] There are some cases seemingly at variance with this rule, but they are cases in which the contract was absolute, and not impliedly conditional upon the existence of the subject-matter.[30]

[27] COUTURIER v. HASTIE, 5 H. L. Cas. 673, Throckmorton Cas. Contracts, 173. See, also, Allen v. Hammond, 11 Pet. 63, 9 L. Ed. 633; Gibson v. Pelkie, 37 Mich. 380; Thompson v. Gould, 20 Pick. (Mass.) 134; Ketchum v. Catlin, 21 Vt. 191; King v. Doolittle, 1 Head (Tenn.) 77; Scioto Fire Brick Co. v. Pond, 38 Ohio St. 65; Anderson v. Armstead, 69 Ill. 452; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61; Riegel v. Insurance Co., 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166; Bluestone Coal Co. v. Bell, 38 W. Va. 207, 18 S. E. 493; Thwing v. Lumber Co., 40 Minn. 184, 41 N. W. 815; United States v. Charles, 74 Fed. 142, 20 C. C. A. 346; Nordyke & Marmon Co. v. Kehlor, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[28] Strickland v. Turner, 7 Exch. 208. And see Cochran v. Willis, L. R. 1 Ch. App. 58. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[29] Bingham v. Bingham, 1 Ves. Sr. 126; Cooper v. Phibbs, L. R. 2 H. L. 170; Varnum v. Town of Hygate, 65 Vt. 416, 26 Atl. 628; Hamilton v. Park & McKay Co., 125 Mich. 72, 83 N. W. 1018; Blaney v. Rogers, 174 Mass. 277, 54 N. E. 561; post, p. 256. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[30] Barr v. Gibson, 3 Mees. & W. 390; Hills v. Sughrue, 15 Mees. & W. 253. "The parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can call for respecting them, else they will not be bound. The reason is that they proceed under an idea that the fact which is the inducement to the contract is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event. But where the parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the

Same—Mistake as to Identity of Subject-Matter

An agreement may be void where there is a mistake as to the identity of the subject-matter; as, for instance, where the contract is in reference to a thing of a certain name, and one of the parties thinks he is contracting for one thing that answers the description, while the other party thinks it is something else which also answers the description. Thus, where a person agreed to buy a cargo "to arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one, and the seller the other, it was held that there was no contract.[81]

The things meant by the parties must have fitted the description, or there is no mistake. If, in the case above mentioned, the buyer had meant a ship of a different name, he would have been bound by the terms of his contract. Unless the description admits of more meanings than one, the party setting up mistake can only do so by showing that he meant something different from what he said, and, as we have seen, he cannot do this. Nor will a mere misnomer of the subject-matter of a contract entitle either party to avoid it if the contract itself contains such a description of its subject-matter as practically identifies it.[82]

Same—Mistake as to Nature and Essential Qualities of Subject-Matter

If the parties are agreed as to the terms and subject-matter of the contract, it is complete by mutual assent, notwithstanding that the parties may be totally mistaken in the motives which induced the assent. The fact that the subject-matter of the contract possessed, or failed to possess, qualities which the parties both believed, or did not believe, it to possess, is immaterial.[83] The parties may, in-

contract will be valid, notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract." Perkins v. Gay, 3 Serg. & R. (Pa.) 327, 8 Am. Dec. 653. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[81] Raffles v. Wichelhaus, 2 Hurl. & C. 906. And see Gardner v. Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Thornton v. Kempster, 5 Taunt. 786; Cutts v. Guild, 57 N. Y. 229; Sheldon v. Capron, 3 R. I. 171; Harvey v. Harris, 112 Mass. 32. Where on a sale of land one party thinks he is buying one tract, and the other party thinks he is selling a different tract, there is no contract. Kyle v. Kavanagh, supra; Stong v. Lane, 66 Minn. 94, 68 N. W. 765. And see IRWIN v. WILSON, 45 Ohio St. 426, 15 N. E. 209, Throckmorton Cas. Contracts, 176. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[82] Ionides v. Pacific Ins. Co., L. R. 6 Q. B. 686; Hazard v. Insurance Co., 1 Sumn. 218, Fed. Cas. No. 6,282. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[83] WOOD v. BOYNTON, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610, Throckmorton Cas. Contracts, 180; Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651,

deed, make the existence of some quality a condition of the contract, as if they should contract for the sale of "this uncut diamond," in which case, if the contract should be construed as making it a condition that the uncut stone in question should be a diamond and in fact the stone was not a diamond, there would be no contract, because the subject-matter of the contract was not in existence.[84] On the other hand, if the subject of sale was an uncut stone, as a matter of fact believed by both parties to be a diamond, but there was nothing in the terms of the contract to make it a condition that the stone should be a diamond, their mutual mistake as to the nature of the stone would not affect the validity of the contract.[85] Thus, where a woman sold an uncut stone to a jeweler for $1, both being ignorant of the nature of the stone, and it turned out to be a diamond worth $1,000, it was held that the contract was binding.[86] So where the subject of sale was a note, the maker of which the parties mutually supposed to be solvent.[87] It is difficult to reconcile with the current of authority the case of Sherwood v. Walker, where the subject of sale was a blooded cow,

9 Am. St. Rep. 708; Taylor v. Fleet, 4 Barb. (N. Y.) 95; Taylor v. Ford, 131 Cal. 440, 63 Pac. 770; Stewart v. Ticonic Nat. Bank, 104 Me. 578, 72 Atl. 741. A settlement with a railway company for injuries is binding, although the parties were ignorant of the extent of the injuries. Rideal v. Railway Co., 1 Fost. & F. 706; Seeley v. Traction Co., 179 Pa. 334, 36 Atl. 229; Kowalke v. Light Co., 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877; Houston & T. C. R. Co. v. McCarty, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[84] "But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing, for some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely, without that quality, is not that to which the common intention of the parties was directed, and the agreement is void. An error of this kind will not suffice to make the transaction void, unless (1) it is such that, according to the ordinary course of dealing and use of language, the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind; (2) and the error is also common to both parties." Pol. Cont. (3d Ed.) 450. See, on this point, Brant. Cont. 104–108; Miles v. Stevens, 3 Pa. 21, 45 Am. Dec. 621; IRWIN v. WILSON, 45 Ohio St. 426, 15 N. E. 209, Throckmorton Cas. Contracts, 176; Watson v. Brown, 113 Iowa, 308, 85 N. W. 28. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[85] Hood v. Todd, 139 Ky. 426, 58 S. W. 783. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 31; Cent. Dig. §§ 35–37.*

[86] WOOD v. BOYNTON, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610, Throckmorton, Cas. Contracts, 180. *See "Sales," Dec. Dig. (Key-No.) §§ 19, 36; Cent. Dig. §§ 32, 63, 64.*

[87] Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

believed by the parties to be barren, and hence worth only $80, which was the price, but actually capable of breeding, and hence worth not less than $750, and it was held that the seller could rescind on the ground that the mistake went to the substance of the agreement.[38]

Same—Mistake as to Quantity of Subject-Matter

Quantity as well as quality may be a condition of the contract, and in such case, if the designated quantity does not exist, there is no contract because of the nonexistence of the subject-matter. Where, for example, the contract is for the sale of a described tract, which is also described as containing a certain number of acres, it has been held that a material difference in the quantity is ground for rescission.[39]

Mistake as to Price

A mistake by one party in the statement of the price, which mistake is not known to the other, does not affect the validity of the contract formed by the acceptance of the offer as made.[40]

Of course, if the acceptance varies from the terms of the offer, there is no contract. Thus, where, by mistake of a telegraph clerk, an offer is wrongly transmitted, and is accepted as altered, it has been held that the offeror is not bound.[41] So if the price is stated in such terms that the offeree understands it as for one quantity,

[38] Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[39] Newton v. Tolles, 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593. As to mistake as to quantity of land, and relief in equity, see Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371; Miller v. Craig, 83 Ky. 623, 4 Am. St. Rep. 179; Pratt v. Bowman, 37 W. Va. 715, 17 S. E. 210; Hill v. Buckley, 17 Ves. 394; Rogers v. Pattie, 96 Va. 498, 31 S. E. 897; Bingham v. Madison, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 31, 108; Cent. Dig. §§ 35–37.*

[40] Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255; Tatum v. Coast Lumber Co., 16 Idaho, 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[41] Henkel v. Pape, L. R. 6 Exch. 7; Pegram v. Telegraph Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 600, 10 Am. St. Rep. 699. Some courts, however, hold the contrary, on the ground that the telegraph company; being selected by the proposer, is his agent, and that he and not the other party should suffer loss from the error. His remedy is against the telegraph company if it was negligent. See Western Union Tel. Co. v. Shotter, 71 Ga. 760; Ayer v. Telegraph Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. And see Durkee v. Railroad Co., 29 Vt. 127; Anheuser-Busch Brewing Ass'n v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575; Howley v. Whipple, 48 N. H. 487; Saveland v. Green, 40 Wis. 431; Barons v. Brown, 25 Kan. 410. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

while the offeror means it in another, the parties are never ad idem.[42] The effect of such mistake is merely to show that there was no contract, because of the failure of the minds of the parties to meet.

Mistake of Law

As a rule, ignorance or mistake of law, by reason of which the parties do not understand the legal effect of their contract, does not avoid it, unless there is some fraud, or unless there is a relation of confidence between the parties.[43]

In cases where the nonexistence of a right is concerned, it has been said that the mistake is not a mistake of law, so as to render the avoidance of a contract on that ground a violation of the rule that ignorance of law is no excuse. "It is said, 'Ignorantia juris haud excusat;' but in that maxim the word 'jus' is used in the sense of denoting general law—the ordinary law of the country. But, when the word 'jus' is used as denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law; but, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." [44] Under this rule, the sale of a thing which, unknown to

[42] Greene v. Bateman, 2 Woodb. & M. 350. See, also, Rupley v. Daggett, 74 Ill. 351; Rovegno v. Defferari, 40 Cal. 459; Peerless Glass Co. v. Tinware Co., 121 Cal. 641, 54 Pac. 101. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[43] Birkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740; Fish v. Cleland, 33 Ill. 243; Hunt v. Rhodes, 1 Pet. 1, 7 L. Ed. 27; Storrs v. Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316; Starr v. Bennett, 5 Hill (N. Y.) 303; Bank of United States v. Daniel, 12 Pet. 32, 9 L. Ed. 989; Mellish v. Robertson, 25 Vt. 603; Good v. Herr, 7 Watts & S. (Pa.) 253, 43 Am. Dec. 236; Rice v. Manufacturing Co., 2 Cush. (Mass.) 80; Dodge v. Insurance Co., 12 Gray (Mass.) 65; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; Townsend v. Cowles, 31 Ala. 428; Christy v. Sullivan, 50 Cal. 337; Wheaton v. Wheaton, 9 Conn. 96; Goltra v. Sanasack, 53 Ill. 458; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Porter v. Jefferies, 40 S. C. 92, 18 S. E. 229; Osburn v. Throckmorton, 90 Va. 311, 18 S. E. 285; Pittsburgh & L. R. Iron Co. v. Iron Co., 118 Mich. 109, 76 N. W. 395; post, pp. 226, 542. But see Lowndes v. Chisholm, 2 McCord, Eq. (S. C.) 455, 16 Am. Dec. 667. In North Dakota a mistake of law common to both parties renders the contract void by statute. Silander v. Gronna, 15 N. D. 552, 108 N. W. 544, 125 Am. St. Rep. 616. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[44] Cooper v. Phibbs, L. R. 2 H. L. 170, per Lord Westbury. And see Wilson v. Insurance Co., 60 Md. 157; Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Lovell v. Wall, 31 Fla. 73, 12 South. 659; Motherway v. Wall, 168 Mass. 333, 47 N. E. 135; Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. "In the often quoted passage * * * he [Lord Westbury] only meant that cer-

the parties, already belongs to the buyer, or does not belong to the seller, is void.[45] This is not a mistake of law, but of fact.

Ignorance of foreign laws, including the laws of a sister state, is regarded as ignorance of fact, and not of law, since a person is not bound to acquaint himself with them.[46]

A mistake in drawing up a contract, or a mistake in the legal effect of a description in a deed or other writing, or in the use of technical language, may be ground for relief in equity.[47]

SAME—EFFECT—REMEDIES

132. EFFECT. Mistake, where it has any effect, renders a contract void.

133. REMEDIES AT LAW. At common law the contract may be repudiated if it is executory, or, if executed in whole or in part, what has been paid or delivered under it may be recovered back.

134. REMEDIES IN EQUITY. In equity a suit for specific performance may be resisted; or suit may be brought to declare the contract void; or, if the mistake is merely in drawing up the contract, suit may be brought to reform the instrument.

As we shall presently see, fraud renders a contract voidable only. The effect of mistake, however, where it has any operation

tain words, such as 'ownership,' 'marriage,' 'settlement,' etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such an assertion is a mistake of fact." Alton v. Bank, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144, 34 Am. St. Rep. 285, per Holmes, J. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[45] 2 Bl. Comm. 450; Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; Bingham v. Bingham, 1 Ves. Sr. 126; Martin v. McCormick, 8 N. Y. 331; Cutts v. Guild, 57 N. Y. 229. Contra, Birkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740. Ante, p. 252. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[46] Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Vinal v. Improvement Co., 53 Hun, 247, 6 N. Y. Supp. 595; Bank of Chillicothe v. Dodge, 8 Barb. (N. Y.) 233; Wood v. Roeder, 50 Neb. 476, 70 N. W. 27; Rosenbaum v. Credit System Co., 64 N. J. Law, 34, 44 Atl. 966. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[47] Canedy v. Marcy, 13 Gray (Mass.) 373; Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52; Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678; Benson v. Markoe, 37 Minn. 30, 33 N. W. 88, 5 Am. St. Rep. 816; Kyner v. Boll, 182 Ill. 171, 54 N. E. 925; Pinkham v. Pinkham, 60 Neb. 600,

at all, is to render the contract void.[48] The common law, therefore, offers two remedies to a person who has entered into an agreement which is void on the ground of mistake. If it be still executory, he may repudiate it, and successfully defend an action brought upon it. If he has paid money under it, he may recover it back upon the general principle that "where money is paid to another under the influence of a mistake—that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue—an action will lie to recover it back." [49]

In equity the victim of the mistake may resist specific performance of the contract, and may sometimes do so successfully when he might not be able to successfully defend an action at law for damages arising from its breach.[50] He may also sue to have the contract declared void, and to be freed from his liabilities in respect of it. If the mistake was in drawing up the contract, a suit in equity may be brought to correct the mistake, and reform the instrument so it will express the real intention of the parties.[51]

A party who is entitled to avoid a contract on the ground of mistake must rescind at law, or seek his relief in equity, within a reasonable time after knowledge of the mistake.[52]

83 N. W. 837. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[48] FOSTER v. MACKINNON, L. R. 4 C. P. 704, 38 L. J. C. P. N. S. 310, 20 L. T. N. S. 887, 17 Wkly. Rep. 1105, Throckmorton Cas. Contracts, 166; CUNDY v. LINDSAY, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406, Throckmorton Cas. Contracts, 169. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[49] Kelly v. Solari, 9 Mees. & W. 54; Wheadon v. Olds, 20 Wend. (N. Y.) 174; post, pp. 630, 637. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[50] Webster v. Cecil, 30 Beav. 62; Frisby v. Ballance, 4 Scam. (Ill.) 287, 39 Am. Dec. 409; Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447. *See "Contracts," Dec. Dig. (Key-No.) § 259; Cent. Dig. §§ 1156–1159; "Specific Performance," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 155–159.*

[51] Elliott v. Sackett, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678; Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193; Newcomer v. Kline, 11 Gill & J. (Md.) 457, 37 Am. Dec. 74; Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613; Jenks v. Fritz, 7 Watts & S. (Pa.) 201, 42 Am. Dec. 227; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371. *See "Reformation of Instruments," Dec. Dig. (Key-No.) § 17; Cent. Dig. §§ 69–71.*

[52] Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798; Thomas v. Bartow, 48 N. Y. 193; Sable v. Maloney, 48 Wis. 331, 4 N. W. 479; Dodge v. Insurance Co., 12 Gray (Mass.) 71; Diman v. Railroad Co., 5 R. I. 130. *See "Reformation of Instruments," Dec. Dig. (Key-No.) § 32; Cent. Dig. §§ 119–121.*

MISREPRESENTATION

135. Misrepresentation is an innocent misstatement or nondisclosure of facts. It must be distinguished from
(a) Fraud, which is a false representation (or nondisclosure under such circumstances that it amounts to a misrepresentation) known to be false, or made in reckless ignorance as to its truth or falsity.
(b) Conditions and warranties, which are representations constituting terms of the contract.

SAME—EFFECT

136. Mere misrepresentation has at law no effect on a contract, except in the case of contracts said to be uberrimæ fidei, in which, from their nature, or from the particular circumstances, one party must rely on the other for his knowledge of the facts, and the other is bound to the utmost good faith. These are:
(a) Contracts of marine, fire, and life insurance.
(b) Contracts between persons occupying a confidential relation, as between attorney and client, principal and agent, guardian and ward, trustee and cestui que trust, etc.
(c) To a limited extent, contracts for the sale of land.
(d) In England, and probably with us, contracts with promoters of a corporation for the purchase of shares.

137. Where misrepresentation has any effect at all, it renders the contract voidable.

138. A material misrepresentation is ground for granting or refusing equitable relief.

What Amounts to a Representation

A representation is an affirmation by words or conduct of a matter of fact by way of inducement to the making of a contract. In speaking of representations in entering into contracts of insurance, Mr. Justice Story said: "To constitute a representation, there should be an explicit affirmation or denial of a fact—of such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use without intending to authorize a particular conclusion, the

assured ought not to be bound by the conjectures, or calculations of probability, of the underwriter," [53]

A mere statement or expression of opinion or statement of intention will not amount to a representation, the falsity of which will avoid a contract.[54] Thus, in a contract of marine insurance, the assured communicated to the insurer a letter from the master of his vessel, stating that, in his opinion, the anchorage of the place to which the vessel was bound was safe. The vessel was lost there, but the court held that the assured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the expressions contained in the letter were not a representation of fact, but an opinion which the insurers could act upon or not, as they pleased.[55] Nor are commendatory expressions, such as men habitually use in order to induce others to enter into a bargain, regarded as representations of fact.[56] The misrepresentation, to be effective at all in avoidance of the contract, must have been relied upon by the other party, and have induced him to enter into the contract, or, rather, it must have been one of the inducements.[57] This will be more fully considered in treating of fraud.[58]

Misrepresentation Distinguished from Fraud

"Misrepresentation," as the term is here used, must be distinguished from "fraud," with which we are to deal presently. Misrepresentation means an innocent misstatement or nondisclosure of

[53] Livingston v. Maryland Ins. Co., 7 Cranch, 506, 541, 3 L. Ed. 421. *See "Insurance," Dec. Dig. (Key-No.) §§ 253–256; Cent. Dig. §§ 538–549.*

[54] Dowdall v. Canndy, 32 Ill. App. 207; Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200; Rice v. Insurance Co., 4 Pick. (Mass.) 439; Allegre's Adm'rs v. Insurance Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Fosdick v. Insurance Co., 3 Day (Conn.) 108; Dennison v. Insurance Co., 20 Me. 125, 37 Am. Dec. 42; Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[55] Anderson v. Insurance Co., L. R. 7 C. P. 65. *See "Insurance," Dec. Dig. (Key-No.) § 272; Cent. Dig. §§ 572–582.*

[56] A statement by an auctioneer that land which he offered for sale was "very fertile and improvable," whereas, in fact, it was in part abandoned as useless, was held to be "a mere flourishing description by an auctioneer," and not such a representation as would avoid the sale. Dimmock v. Hallett, L. R. 2 Ch. 21, 27. But on the sale of an hotel it was held that the contract was avoided by a false statement that the present lessee was "a most desirable tenant." Smith v. Property Co., 28 Ch. Div. 7. And see Tuck v. Downing, 76 Ill. 71. See, also, post, p. 282. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 520–530.*

[57] Tuck v. Downing, 76 Ill. 71; Fauntleroy v. Wilcox, 80 Ill. 477; Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627; post, p. 289. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[58] See post, pp. 282, 289.

facts, while fraud consists in representations which are known to be false, or which are made in reckless ignorance of their truth or falsity, or in nondisclosure or concealment of facts under such circumstances that it amounts to a representation that the facts concealed do not exist. This will be more fully explained in treating of fraud. The practical test of fraud, as opposed to mere misrepresentation, is that fraud gives rise to an action ex delicto, while innocent misrepresentation does not. Fraud, besides being a vitiating element in contract, is a tort or wrong apart from contract, and may be treated as such by bringing an action of deceit. Misrepresentation, in exceptional cases, may invalidate a contract, but will not support an action of deceit.

Misrepresentation Distinguished from Conditions and Warranties

It may be stated as a rule, subject to exception in case of certain contracts to be hereafter noticed, that innocent misrepresentation or nondisclosure of fact does not affect the validity of consent. The tendency of the courts has been to bring, if possible, every statement which is important enough to affect consent into the terms of the contract, and a representation which cannot be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at least an integral part of its terms, is set aside altogether. If it is a part of the contract, it is no longer called a mere misrepresentation; it is a condition or warranty, and its falsity does not affect the formation of the contract, but operates to discharge the injured party from his obligation, or gives him a right of action based on the contract for loss sustained by reason of the untruth of the statement. The statement in such case is a term of the contract.

The distinctions are well shown in a leading English case. The action was brought on a charter party in which it was agreed that the plaintiff's ship, "then in the port of Amsterdam," should proceed to a certain port and load a cargo. At the date of the contract the ship was not in the port of Amsterdam, and did not arrive there for several days. The defendant refused to carry out the agreement, and repudiated it. The court held that the statement that the ship was in the port of Amsterdam was intended by the parties to be a condition, and a breach thereof discharged the charterer.[59]

[59] Behn v. Burness, 3 Best & S. 751. And see Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768; NORRINGTON v. WRIGHT, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, Throckmorton Cas. Contracts, 386. As to the distinction in contracts of insurance, see Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Schwarzbach v. Protective Union, 25 W. Va. 655, 52 Am. Rep. 227; GLOBE MUT. LIFE INS. ASS'N v. WAGNER, 188 Ill. 133, 58 N. E. 970, 52

Williams, J., in giving judgment, thus distinguishes the various parts or terms of a contract: "Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance —at all events, marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. * * * Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of charter parties, this question has often been raised with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition,[60] while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.[61] But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine,

L. R. A. 649, 80 Am. St. Rep. 169, Throckmorton Cas. Contracts, 184. *See "Insurance," Dec. Dig. (Key-No.) §§ 253–256; Cent. Dig. §§ 538–549.*

[60] Glaholm v. Hays, 2 Man. & G. 257. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Insurance," Dec. Dig. (Key-No.) § 265; Cent. Dig. § 560.*

[61] Seeger v. Duthie, 8 C. B. (N. S.) 45; Tarrabochia v. Hickie, 1 Hurl. & N. 183. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Insurance," Dec. Dig. (Key-No.) § 265; Cent. Dig. § 560.*

established by principle as well as authority, appears to be, generally speaking, that, if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty; that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

Same—Various Senses of the Terms and Their Effect

It will be observed [62] that in the opinion above quoted "condition" is used in two senses—as meaning a statement that a thing is, and a promise that a thing shall be. In either case the statement or promise is of so important a nature that the untruth of the one, or the breach of the other, discharges the contract. "Warranty" also is used in several senses. It is first made a convertible term with a condition. It is then used "in the narrower sense of the word," in which sense it means (1) a subsidiary promise in the contract, the breach of which could under no circumstances do more than give rise to an action for damages, and (2) a condition, the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may give rise to an action for damages.

The various senses of the terms we have been discussing, and their effect, may be summed up as follows: (1) "Representations," not fraudulent, made at the time of entering into the contract, but not forming a part of it, may affect its validity in certain special cases, but are otherwise inoperative. When they do operate, their falsehood vitiates the formation of the contract and makes it voidable. (2) "Conditions" are either statements or promises which form the basis of the contract. Whether or not a term in the contract amounts to a condition must be a question of construction, to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. But when a term in the contract is ascertained to be a condition, then, whether it be a statement or a promise, the untruth or the breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract. (3) "Warranties,"

[62] See Anson, Cont. (8th Ed.) 149.

used in "the narrower sense," are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfill his promise. (4) A condition may be broken, and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or, at any rate, to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.[68] This is sometimes called a "warranty ex post facto."

A strong illustration of the tendency of the courts to bring a statement material enough to affect consent into the terms of the contract is offered by an English case arising out of a sale of hops by the plaintiff to the defendant. It appeared that, before commencing to deal, the defendant asked the plaintiff if any sulphur had been used in the treatment of that year's crop. The plaintiff said, "No." The defendant said that he would not even ask the price if any sulphur had been used. After this the parties discussed the price, and the defendant agreed to purchase the crop of that year. He afterwards repudiated the contract on the ground that sulphur had been used, and the plaintiff sued for the price. It was shown that the plaintiff had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made by the plaintiff as to the use of sulphur was not willfully false, and they further found that "the affirmation that no sulphur had been used was intended by the parties to be a part of the contract of sale, and a warranty by the plaintiff." The court had to consider the effect of this finding, and came to the conclusion that the representation of the plaintiff was a part of the contract, and a preliminary condition, the breach of which entitled the defendant to be discharged from liability. Erle, C. J., said: "We avoid the term 'warranty' because it is used in two senses, and the term 'condition' because the question is whether that term is applicable. Then the effect is that the defendants required, and that the plaintiff gave, his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this

[68] Avery v. Willson, 81 N. Y. 341, 37 Am. Rep. 503; post, p. 584. *See "Sales," Dec. Dig. (Key-No.) §§ 248–251; Cent. Dig. §§ 707–710.*

sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used; and upon this ground we agree that the rule should be discharged." [64]

Conclusion as to Effect of Misrepresentation

From what has been shown, we may state the rule as to misrepresentations in this way: Whenever the validity of a contract is called in question, or the liabilities of the parties are said to be affected, by reason of representations made before or at the time of entering into the contract, the effect of the representation will depend on the answers to the following questions: (1) Were the statements in question a part of the terms of the contract? (2) If not, were they made fraudulently? (3) If neither of these, was the contract one of that class of contracts called "contracts uberrimæ fidei," in which one of the parties had to rely peculiarly on the other for his knowledge of material facts, and the other was bound to the most perfect good faith? If all of these questions are answered in the negative, the representation has no effect at all." [65]

Excepted Contracts Affected by Mere Misrepresentation

To the general rule that misrepresentations not amounting to fraud, and not forming a term of the contract, do not affect its validity, there are exceptions in case of certain special contracts sometimes said to be uberrimæ fidei; that is, contracts of such a character that one of the parties must rely on the other for his knowledge of the facts. As the term implies, the most perfect good faith is required in such cases, and any material misstatement or concealment of facts, even though innocent, will avoid the contract.

Same—Contracts of Insurance

Among these excepted contracts are contracts of insurance. In the case of a contract of marine insurance the assured is bound to give the insurer all such information as would be likely to affect his judgment in accepting the risk, and misrepresentation or non-

[64] Bannerman v. White, 10 C. B. (N. S.) 860. *See "Sales," Dec. Dig. (Key-No.) §§ 248–251; Cent. Dig. §§ 707–710.*

[65] GLOBE MUT. LIFE INS. ASS'N v. WAGNER, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169, Throckmorton Cas. Contracts, 184. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

disclosure of any such matter, though perfectly innocent, will vitiate the policy.[66] As said by the Ohio court: "The assured is bound to communicate every material fact within his knowledge not known, or presumed to be known, to the underwriter, whether inquired for or not; and a failure in either particular, although it might have arisen from mistake, accident, or forgetfulness, is attended with the rigorous consequence that the policy never attaches, and is void, for the reason that the risk assumed is not the one intended to be assumed by the parties." [67] Thus, a policy of marine insurance has been avoided because the goods were insured for an amount considerably in excess of their value, though the fact of overvaluation did not affect the risks of the voyage, simply because the valuation is a fact usually taken into consideration by underwriters.[68]

It is said that the doctrine applicable to marine insurance does not apply, to the full extent, to other contracts of insurance.[69] It is settled, however, that any false representation of a material fact, however innocently made, will avoid the policy.[70] It has even been held, in cases where the fact undisclosed was peculiarly within the knowledge of the insured, and not such as to be patent on examination, that the innocent nondisclosure of a material fact will vitiate the policy. Where, for instance, one fire insurance company reinsured a risk in another company without informing the latter that it had heard that the assured, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured, it was held that such nondisclosure, though unintentional, vitiated the contract of reinsurance.[71] Where, however,

[66] McLanahan v. Insurance Co., 1 Pet. 170, 7 L. Ed. 98; Lewis v. Insurance Co., 10 Gray (Mass.) 508; Ely v. Hallett, 2 Caines (N. Y.) 57; Stoney v. Insurance Co., Harp. (S. C.) 235; Lexington Fire, Life & Marine Ins. Co. v. Paver, 16 Ohio, 324; Vale v. Insurance Co., 1 Wash. C. C. 283, Fed. Cas. No. 16,811; Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348. *See "Insurance," Dec. Dig. (Key-No.) §§ 256, 272; Cent. Dig. §§ 540, 549, 572–582.*

[67] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, at page 462, 59 Am. Dec. 684. *See "Insurance," Dec. Dig. (Key-No.) §§ 254, 256; Cent. Dig. §§ 543–549.*

[68] Ionides v. Pender, L. R. 9 Q. B. 537. *See "Insurance," Dec. Dig. (Key-No.) § 281; Cent. Dig. §§ 597–600.*

[69] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St., at page 463, 59 Am. Dec. 684. And see Burritt v. Insurance Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Wineland v. Insurance Co., 53 Md. 276; United States Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325. *See "Insurance," Dec. Dig. (Key-No.) § 256; Cent. Dig. §§ 540, 549.*

[70] Armour v. Insurance Co., 90 N. Y. 450. *See "Insurance," Dec. Dig. (Key-No.) § 256; Cent. Dig. §§ 540, 549.*

[71] New York Bowery Fire Ins. Co. v. Insurance Co., 17 Wend. (N. Y.) 359.

as is now generally the practice, written applications for insurance are required, in which specific questions are asked and answered, an innocent failure to disclose facts about which no inquiry is made will not avoid the policy, though it is otherwise where there is an innocent failure to disclose a fact where inquiry is made.[72]

In England and in some of our states a distinction has been drawn between life insurance and marine and fire insurance, and life insurance has been said not to be within the exception to the rule that innocent misrepresentation does not avoid a contract.[73] In most of our states, however, no distinction is made in this respect between life and fire insurance, misrepresentation of a material fact, whether innocent or fraudulent, avoiding the policy.[74]

Even in England the tendency of the modern adjudications is towards applying the doctrine that innocent misrepresentation, including nondisclosure, vitiates a contract of fire or life, as well as marine, insurance, without any practical distinction.[75]

Same—Contracts for the Sale of Land

It is said by Sir William Anson that contracts for the sale of land are uberrimæ fidei, and therefore within the exception to the

And see Walden v. Insurance Co., 12 La. 134, 32 Am. Dec. 116; Curry v. Insurance Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547; Fowler v. Insurance Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; Bobbitt v. Insurance Co., 66 N. C. 70, 8 Am. Rep. 494. *See "Insurance," Dec. Dig. (Key-No.) § 256; Cent. Dig. §§ 540, 549.*

[72] Green v. Insurance Co., 10 Pick. (Mass.) 402; Com. v. Insurance Co., 112 Mass. 136, 17 Am. Rep. 72; Washington Mills Mfg. Co. v. Insurance Co., 135 Mass. 505; Burritt v. Insurance Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Browning v. Insurance Co., 71 N. Y. 508, 27 Am. Rep. 86; North American Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; Clark v. Insurance Co., 8 How. 249, 12 L. Ed. 1061; Ripley v. Insurance Co., 30 N. Y. 136, 86 Am. Dec. 362; Short v. Insurance Co., 90 N. Y. 16, 43 Am. Rep. 138. *See "Insurance," Dec. Dig. (Key-No.) § 256; Cent. Dig. §§ 540, 549.*

[73] Whulton v. Hardesty, 8 El. & Bl., at page 299; Schwarzbach v. Protective Union, 25 W. Va. 655, 52 Am. Rep. 227. And see GLOBE MUT. LIFE INS. ASS'N v. WAGNER, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169, Throckmorton Cas. Contracts, 184. *See "Insurance," Dec. Dig. (Key-No.) §§ 256, 272; Cent. Dig. §§ 540, 549, 572–582.*

[74] Bliss, Ins. 75; Vose v. Insurance Co., 6 Cush. (Mass.) 42; Campbell v. Insurance Co., 98 Mass. 381, at page 396; Goucher v. Association (C. C.) 20 Fed. 596; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Mutual Ben. Life Ins. Co. v. Wise, 34 Md. 582; Ætna Life Ins. Co. v. France, 91 U. S. 512, 23 L. Ed. 401. See Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; Cable v. Insurance Co., 111 Fed. 19, 49 C. C. A. 216. *See "Insurance," Dec. Dig. (Key-No.) §§ 256, 272; Cent. Dig. §§ 540, 549, 572–582.*

[75] London Assurance v. Mansel, 41 Law T. (N. S.) 225. *See "Insurance," Dec. Dig. (Key-No.) §§ 256, 272; Cent. Dig. §§ 540, 549, 572–582.*

rule that innocent misrepresentation does not affect the validity of the contract; but this is so only to a very limited extent, even in England,[76] and probably to a less extent in this country. As a rule, the courts of law with us recognize no distinction in this respect between contracts for the sale of land and other contracts.[77] A purchaser of land, it has been held, is not bound to disclose facts within his knowledge which render the land worth much more than the price he offers; as, for instance, the fact that there is a valuable mine under it.[78] It has, however, been held that a misdescription of the land, or of the title, or of the terms to which it is subject, though made without any fraudulent intention, will avoid the contract.[79] Courts of equity have granted or refused their peculiar remedies in the case of contracts for the sale of land because of innocent misrepresentation,[80] but this has been because of principles peculiar to equity, and not because of the nature of the contract. The same principles have been applied, and the same relief granted or refused, in the case of other contracts.

Same—Contracts to Purchase Shares in Companies

Another exception is in the case of contracts with the promoters of a corporation for the purchase of shares. It is said in an English case: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any

[76] 2 Add. Cont. § 538; 1 Sugd. Vend. 8.

[77] Livingston v. Iron Co., 2 Paige, Ch. (N. Y.) 392; Williams v. Spurr, 24 Mich. 335. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 33; Cent. Dig. §§ 38–66.*

[78] Note 93, infra.

[79] Flight v. Booth, 1 Bing. N. C. 370; Jones v. Edney, 3 Camp. 285; In re Fawcett & Holmes, 42 Ch. Div. 156; Rayner v. Wilson, 43 Md. 440; McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Rimer v. Dugan, 39 Miss. 477, 77 Am. Dec. 687; Tyson v. Passmore, 2 Pa. 122, 44 Am. Dec. 181; Keating v. Price, 58 Md. 532, at page 536; Gunby v. Sluter, 44 Md. 237; Foley v. Crow, 37 Md. 51; Mitchell v. McDougall, 62 Ill. 498; Baughman v. Gould, 45 Mich. 481, 8 N. W. 73; Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42; Mulvey v. King, 39 Ohio St. 491. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 33–38; Cent. Dig. §§ 38–66.*

[80] Price v. McCauley, 19 Eng. Law & Eq. 162; O'Rourk v. Percival, 2 Ball & B. 58; Brooks v. Hamilton, 15 Minn. 26 (Gil. 10); Mohler v. Carder, 73 Iowa, 582, 35 N. W. 647; Watson v. Baker, 71 Tex. 739, 9 S. W. 867. *See "Specific Performance," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 160–171½.*

degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."[81] As said in a New York case, the promoters of a corporation occupy before its organization a position of trust and confidence towards those whom they seek to induce to invest in the enterprise.[82]

Same—Confidential Relations in General

All contracts, whatever may be the subject-matter, are uberrimæ fidei, where the parties occupy a confidential relation towards each other, as in the case of contracts between an attorney and his client, a principal and his agent, a trustee and his cestui que trust, a guardian and his ward, a parent and his child, etc. The parties in such a case do not stand on equal ground; one of them reposes confidence in the other, and the latter, in dealing with the former, is held to the utmost good faith, and can gain no advantage by his dealings. Any misrepresentation or nondisclosure of material facts will vitiate a contract between them.[83] All the exceptions to the rule that innocent misrepresentation does not avoid a contract are based on the fact that a relation of confidence exists between the parties.[84]

Same—Contracts of Suretyship

The contract of suretyship has sometimes been treated as being within this excepted class of contracts, but as regards the formation of the contract it is not really so. To vitiate such a contract the misrepresentation or nondisclosure must amount to fraud; but we shall see, in treating of fraud, that nondisclosure of facts which there is a duty to disclose is sometimes regarded as fraud, without

[81] New Brunswick & C. R. Co. v. Muggeridge, 1 Drew. & S. 381. And see Venezuela R. Co. v. Kisch, L. R. 2 H. L. 113; Peek v. Gurney, L. R. 6 H. L. 403. *See "Corporations," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 244–264.*

[82] Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498. *See "Corporations," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 244–264.*

[83] Brooks v. Martin, 2 Wall. 70, at page 84, 17 L. Ed. 732; Baker v. Humphrey, 101 U. S. 494, at page 502, 25 L. Ed. 1065; James v. Steere, 16 R. I. 367, 16 Atl. 143, 2 L. R. A. 164; Smith v. Davis, 49 Md. 470; McConkey v. Cockey, 69 Md. 286, 14 Atl. 465; Reed v. Peterson, 91 Ill. 288; Ward v. Armstrong, 84 Ill. 151; Zeigler v. Hughes, 55 Ill. 288; Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568; Casey v. Casey, 14 Ill. 112; Bowen v. Kutzner, 107 Fed. 281, 93 C. C. A. 33 (brother and sister); post, p. 308. *See "Attorney and Client," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 239–249; "Guardian and Ward," Dec. Dig. (Key-No.) §§ 62, 63, 99; Cent. Dig. §§ 288–299, 370, 371; "Parent and Child," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 74, 111–113; "Trusts," Dec. Dig. (Key-No.) §§ 81, 283; Cent. Dig. §§ 115–118, 403, 404.*

[84] 2 Pom. Eq. Jur. § 902.

regard to the question of motive or design.[85] Where the contract of suretyship has once been formed, the surety is entitled to be informed of any agreement between the creditor and the debtor which alters their relations, or any circumstance which would give him a right to avoid the contract.[86] Failure of the creditor to give such information does not affect the formation of the contract, but merely discharges the surety from any further liability, and therefore the question has nothing to do with our present discussion.

Agent's Warranty of Authority

To the rule that an innocent misrepresentation has no effect upon the liabilities of the parties another exception must be noted. A person who contracts as agent in effect represents that he has the authority of his principal, and if the representation is untrue he is liable to the other party for any resulting loss, even if he acted in good faith and in the belief that he had authority. By a fiction, the professed agent is deemed to warrant his authority.[87]

Effect in Equity

This rule as to the effect of misrepresentations is not adhered to in courts of equity. A false statement made by one of the parties to the other has been held sufficient ground for refusing specific performance of the contract, though there was no fraud, and the statement was not a term in the contract;[88] and a false representation believed to be true at the time it was made, and which was no part of the contract, has been held sufficient ground for setting the contract aside.[89]

[85] North British Ins. Co. v. Lloyd, 10 Exch. 523; Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231; Hamilton v. Watson, 12 Clark & F. 109; Guardian Fire & Life Assur. Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; post. p. 274. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Principal and Surety," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 82–85.*

[86] Phillips v. Foxall, L. R. 7 Q. B. 666; Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Evans v. Kneeland, 9 Ala. 42. But see Atlantic & P. Telegraph Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Jones v. United States, 18 Wall. 662, 21 L. Ed. 867. *See "Principal and Surety," Dec. Dig. (Key-No.) §§ 50, 97; Cent. Dig. §§ 146–168.*

[87] Collen v. Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647; Cherry v. Colonial Bank, L. R. 3 P. C. 24, 38 L. J. P. C. 49, 21 L. T. Rep. N. S. 356, 6 Moore P. C. N. S. 235, 17 Wkly. Rep. 1031, 16 Eng. Reprint, 714. And see Tiffany Ag. p. 368. *See "Principal and Agent," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 447–450, 476–491.*

[88] Lamare v. Dixon, L. R. 6 H. L. 414, at page 428. *See "Specific Performance," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 160–171½.*

[89] Traill v. Baring, 4 De Gex, J. & S. 318, 33 L. J. Ch. 521; Redgrave v. Hurd, 20 Ch. Div. 13; Newbigging v. Adam, 34 Ch. Div. 582; Brooks v. Hamilton, 15 Minn. 26 (Gil. 10); Smith v. Richards, 13 Pet. 26, 36, 10 L. Ed. 42; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432; Florida v. Morrison,

We have seen that the tendency of the common-law courts is to bring any statement which is material enough to affect consent, if possible, into the terms of the contract.[90] Where the statement or representation is of this character—that is, where it is a "vital condition"—equity, says Sir William Anson, will give "the same relief, but upon a different and more intelligible principle." In equity an innocent misrepresentation, if it furnishes a material inducement, gives a right to avoid or rescind a contract where capable of recission.[91]

Same—Equitable Estoppel

A representation by a party to a contract, relied upon by the other, may, in equity, create an estoppel against him. This is variously termed an "estoppel by conduct," or an "estoppel in pais," or an "equitable estoppel." Thus, in a suit based on a promise to make a provision by will in consideration of marriage, the chancellor, while admitting that the transaction amounted to a contract, based his decision on "this larger principle: that where a man makes a representation to another, in consequence of which that other alters his position, or is induced to do any other act which is either permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively." [92]

44 Mo. App. 529; Alker v. Alker (Sup.) 12 N. Y. Supp. 676; Joice v. Taylor, 6 Gill & J. (Md.) 54, 25 Am. Dec. 325; Taymon v. Mitchell, 1 Md. Ch. 497; Kent v. Carcaud, 17 Md. 299; Keating v. Price, 58 Md. 532; Thompson v. Lee, 81 Ala. 292; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Wilcox v. University, 32 Iowa, 367; Allen v. Hart, 72 Ill. 104; Twitchell v. Bridge, 42 Vt. 68; Frenzel v. Miller, 37 Ind. 1, 10 Am. Rep. 62; Bankhead v. Alloway, 6 Cold. (Tenn.) 56; Foard v. McComb, 12 Bush (Ky.) 723. But see Tone v. Wilson, 81 Ill. 529; Groff v. Rohrer, 35 Md. 327. *See "Cancellation of Instruments," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 1.*

[90] Ante, p. 261.

[91] Anson, Contr. (8th Ed.) 155, 156, citing Derry v. Peak, 14 App. Cas. 347; Newbigging v. Adam, 34 Ch. Div. 582; Kennedy v. Panama, etc., Co., L. R. 2 Q. B. 580. *See "Cancellation of Instruments," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 1–6.*

[92] Coverdale v. Eastwood, L. R. 15 Eq. 121. And see Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Thrall v. Thrall, 60 Wis. 503, 19 N. W. 353; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Com. v. Moltz, 10 Pa. 527, 51 Am. Dec. 499; Cowles v. Bacon, 21 Conn. 451, 56 Am. Dec. 371; Scudder v. Carter, 43 Ill. App. 252; STEVENS v. LUDLUM, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210, Throckmorton, Cas. Contracts, 192; Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. Ed. 618; The Ottumwa Belle (D. C.) 78 Fed. 643. *See "Contracts," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 442–446; "Estoppel," Dec. Dig. (Key-No.) §§ 52–56; Cent. Dig. §§ 121–142.*

FRAUD

139. Fraud is a false representation of a material fact, or nondisclosure of a material fact under such circumstances that it amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury. In detail:

(a) There must, as a rule, be a false representation, and not a mere nondisclosure; but nondisclosure or concealment is equivalent to a false representation—

(1) Where active steps are taken to prevent discovery of the truth.

(2) Where, though the representation made is true as far as it goes, the suppression of facts renders it in fact untrue.

(3) Where, under the circumstances, there is a duty to disclose the facts suppressed, so that failure to disclose them is an implied representation that they do not exist.

(b) The representation must be of a past or existing fact; and therefore fraud cannot result from—

(1) Expressions of opinion, belief, or expectation.

(2) Promises or expressions of intention. A representation, however, that a certain intention exists, when it does not exist, is a false representation of an existing fact.

(3) Representations as to the law, as a rule.

(c) The representation must be of a material fact.

(d) The representation must be of such a character, or must be made under such circumstances, that the other party has a right to rely on it. Fraud, therefore, cannot be predicated upon—

(1) Commendatory expressions as to value, prospects, and the like.

(2) False representations in cases where the means of knowledge are at hand, but the other party does not use them (in some jurisdictions).

(e) The representation must be made with knowledge of its falsity. It is regarded as "knowingly" false—

(1) If actually known to be false.

(2) If made in reckless disregard of whether it is true or false.

(3) If the fact is susceptible of knowledge, and the representation is made as of the party's personal knowledge (in most jurisdictions).

(f) The representation need not be made directly to the other party, but it must be intended to reach him, and to be acted upon by him.

(g) The representation must deceive; that it, it must be relied upon by the other party, and must induce him to act.

(h) It must result in injury.

Fraud is a False Representation

Subject to exceptions to be presently explained, a mere nondisclosure of fact, without more, is not fraud, whatever the intention may be. There must be some active attempt to deceive, either by a statement which is false, or by a representation, true as far as it goes, but accompanied with such a suppression of facts as to make it convey a false impression, or else there must be a concealment of facts which the party is under a duty to disclose.

Same—Silence or Nondisclosure of Facts

Mere silence or nondisclosure of facts may be such a misrepresentation as will avoid a contract uberrimæ fidei, but otherwise it generally has no effect, whatever may be the intention in failing to make the disclosure. Nondisclosure, even with intent to deceive, does not amount to a fraud which will render a contract voidable, or sustain an action for deceit, unless there is active concealment or a suppression of facts which there is a duty to disclose.[88] For instance, in an English case, where the defendant had let to the plaintiff a house which he knew was required for

[88] Peek v. Gurney, L. R. 6 H. L. 403; Dambmann v. Schulting, 75 N. Y. 55; People's Bank of City of New York v. Bogart, 81 N. Y. 103, 37 Am. Rep. 481; Hadley v. Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Rison v. Newberry, 90 Va. 513, 18 S. E. 916; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214; Williams v. Spurr, 24 Mich. 335; Crowell v. Jackson, 53 N. J. Law, 656, 23 Atl. 426; Cleaveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384; Cochrane v. Halsey, 25 Minn. 52; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Coddington v. Goddard, 16 Gray (Mass.) 463. Failure of the purchaser of land to disclose to the vendor the fact that there is mineral under it does not amount to fraud. Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661; Butler's Appeal, 26 Pa. 63; Smith v. Beatty, 37 N. C. 456, 40 Am. Dec. 435. See, also, as to concealment by purchaser, Neill v. Shamburg, 158 Pa. 263, 27 Atl. 992; ante, p. 270, note 85. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

immediate occupation, without disclosing that it was in a ruinous condition and unfit for habitation, it was held that an action for fraud would not lie. "It is not pretended," it was said, "that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit." [94]

The fact that the purchaser of goods fails to disclose the fact that he is insolvent does not amount to fraud if he intends to pay for them, and is not asked as to his financial condition.[95] If, however, at the time of the purchase, he does not intend to pay, he is guilty of fraud, for he impliedly represents that he does intend to pay; [96] and it has been held by a number of courts that.

[94] Keates v. Lord Cadogan, 10 C. B. 591. See, also, Fisher v. Lighthall, 4 Mackey (15 D. C.) 82, 54 Am. Rep. 258; Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622; Foster v. Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[95] Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Morrill v. Blackman, 42 Conn. 324; Zucker v. Karpeles, 88 Mich. 413, 50 N. W. 373; Hotchkin v. Bank, 127 N. Y. 329, 27 N. E. 1050; Le Grand v. Bank, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; Reticker v. Katzenstein, 26 Ill. App. 33; Bidault v. Wales, 20 Mo. 546, 64 Am. Dec. 205; Wilson v. White, 80 N. C. 280. *See "Sales," Dec. Dig. (Key-No.) § 45; Cent. Dig. § 94.*

[96] Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Stewart v. Emerson, 52 N. H. 301; Donaldson v. Farwell, 93 U. S. 633, 23 L. Ed. 993; Ex parte Whittaker, 10 Ch. App. 446; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366; Belding Bros. & Co. v. Frankland, 8 Lea (Tenn.) 67, 41 Am. Rep. 630; Harris v. Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; Wilmot v. Lyon, 49 Ohio St. 296, 34 N. E. 720; Nichols v. McMichael, 23 N. Y. 266, 80 Am. Dec. 259; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Brower v. Goodyer, 88 Ind. 572; Ross v. Miner, 64 Mich. 204, 31 N. W. 185; Id., 67 Mich. 410, 35 N. W. 60; Ayres v. French, 41 Conn. 142; Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Dow v. Sanborn, 3 Allen (Mass.) 181; Yeager Milling Co. v. Lawler, 39 La. Ann. 572, 2 South. 398; Allen v. Hartfield, 76 Ill. 358; Devoe v. Brandt, 53 N. Y. 462; Hennequin v. Naylor, 24 N. Y. 139; Carnahan v. Balley (C. C.) 28 Fed. 519; Fechheimer v. Baum (C. C.) 37 Fed. 167, 2 L. R. A. 153; Shipman v. Seymour, 40 Mich. 274; Wright v. Brown, 67 N. Y. 1; Bidault v. Wales, 20 Mo. 546, 64 Am. Dec. 205; Des Farges v. Pugh, 93 N. C. 31, 53 Am. Rep. 446. There are a few decisions to the contrary. Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51; Bughman v.

if he has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay.[97]

Active efforts to conceal a fact—as, for instance, where obstacles are thrown in the way to prevent the other party's inquiries from resulting in its discovery, or his attention is diverted for such a purpose—are equivalent to a false representation.[98] So, also, if a person makes a representation as to facts which is true as far as it goes, but intentionally suppresses other facts so as to make the representation convey a false impression, this is a false representation, and not a mere nondisclosure. The concealment or withholding of that which is not stated makes that which is stated absolutely false.[99]

Most exceptions to the rule that nondisclosure is not fraud lie in the distinction between mere silence where there is no duty

Bank, 159 Pa. 94, 28 Atl. 209; Bell v. Ellis, 83 Cal. 620. *See "Sales," Dec. Dig. (Key-No.) § 45; Cent. Dig. § 94.*

[97] Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Jaffrey v. Brown (C. C.) 29 Fed. 476; Elsass v. Harrington, 28 Mo. App. 300; Whittin v. Fitzwater, 129 N. Y. 626, 29 N. E. 298; Dalton v. Thurston, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905. But see, contra, Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Biggs v. Barry, 2 Curt. 259, Fed. Cas. No. 1,402; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366. It has even been held that the fact of insolvency and concealment is sufficient to take the case to the jury on the question of intention not to pay. Edson v. Hudson, 83 Mich. 450, 47 N. W. 347; Slagle & Co. v. Goodnow, 45 Minn. 531, 48 N. W. 402. *See "Sales," Dec. Dig. (Key-No.) § 45; Cent. Dig. § 94.*

[98] Turner v. Harvey, Jacob 169 (Lord Eldon); Walters v. Morgan, 3 De G. F. & J. 718; Croyle v. Moses, 90 Pa. 250, 35 Am. Rep. 654; Matthews v. Bliss, 22 Pick. (Mass.) 48; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623; Kenner v. Harding, 85 Ill. 265, 28 Am. Rep. 615; Kohl v. Lindley, 39 Ill. 195, 201, 89 Am. Dec. 294; Cogel v. Kniseley, 89 Ill. 598, 601; Roseman v. Canovan, 43 Cal. 110; Crompton v. Beedle, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399 (active maneuvers of purchaser to conceal from vendor existence of quarry on land); Merchants' Bank of Baltimore v. Campbell, 75 Va. 455 (concealment of Luray Cavern under land purchased for $480). *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[99] Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Hadley v. Clinton Imp. Co., 13 Ohio St. 502, 82 Am. Dec. 454; Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503; Kidney v. Stoddard, 7 Metc. (Mass.) 252; Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373. "If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation." Lomerson v. Johnston, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410. And see Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940; Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728; Baker v. Rockabrand, 118 Ill. 365, 8 N. E. 456. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

to speak, and concealment of facts which are peculiarly within the knowledge of the party concealing them, and which, under the circumstances, he is bound in good faith to disclose. "In an action of deceit," it has been said by the supreme court of the United States, "it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment. 'Aliud est tacere, aliud celare'—a suppression of the truth may amount to a suggestion of falsehood. And if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of, and equivalent to, a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." [1]

In contracts of sale, disclosure is not ordinarily incumbent on the seller. The rule is caveat emptor.[2] It has even been held

[1] Stewart v. Cattle-Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214; Smith v. Countryman, 30 N. Y. 655; Griel v. Lomax, 89 Ala. 420, 6 South. 741; Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368; George v. Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; Beard v. Campbell, 2 A. K. Marsh. (Ky.) 125, 12 Am. Dec. 362; Peebles v. Stephens, 3 Bibb (Ky.) 324, 6 Am. Dec. 660; Waters v. Mattingley, 1 Bibb (Ky.) 244, 4 Am. Dec. 631; Fish v. Cleland, 33 Ill. 238; Mitchell v. McDougall, 62 Ill. 498; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623; Morgan v. Owens, 228 Ill. 598, 81 N. E. 1133. A person taking a bond for the future good conduct of an agent already in his employment must communicate to a surety his knowledge of the past criminal conduct of such agent in the course of his past employment. The mere nondisclosure of such knowledge, irrespective of motive or design, is a fraud, which will invalidate the bond. Guardian Fire & Life Assur. Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; State v. Sooy, 39 N. J. Law, 135; Dinsmore v. Tidball, 34 Ohio St. 418; Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. See ante, p. 270. A man may avoid his promise to marry a woman if she concealed from him the fact that she had previously given birth to a bastard child, or was of immoral character. Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Palmer v. Andrews, 7 Wend. (N. Y.) 143; Berry v. Bakeman, 44 Me. 164; Goodall v. Thurman, 1 Head (Tenn.) 208; Butler v. Eschleman, 18 Ill. 44; Capehart v. Carradine, 4 Strob. (S. C.) 42; post, p. 288. *See "Fraud," Dec. Dig. (Key-No.) §§ 1, 6, 33; Cent. Dig. § 1–8.*

[2] Smith v. Hughes, L. R. 6 Q. B. 597; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214; People's Bank of City of New York v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481; Kintzing v. McElrath, 5 Pa. 467; Cogel v. Kniseley, 89 Ill. 598. *See "Sales," Dec. Dig. (Key-No.) § 41; Cent. Dig. § 84.*

that the seller is not bound to communicate the existence of a latent defect, such as a hidden disease of an animal, unless, by act or implication, he represents that such defects do not exist.[3] But it is generally held in this country that the intentional nondisclosure of such a defect by the seller, when he knows or has reason to know that it is unknown to the buyer, is fraudulent.[4] So where premises leased are infected with a contagious disease, or otherwise subject to a nuisance which is prejudicial to life or health, it has been held that there is a duty to disclose the fact, and that concealment is a fraud.[5]

Mistake as to Nature of Promise Known to Other Party

A mistake on the part of one of the parties to a contract, as a misunderstanding in respect to the nature or qualities of the subject-matter, or a mistake in fixing or expressing the terms, not induced by the conduct of the other party, has as a rule no effect upon the contract.[6] But the law will not allow one party to accept a promise, which he knows that the other party understands in a different sense from that in which he understands it.[7] If the mistake or misunderstanding of the one party as to the nature of the promise is known to the other, or if the other has

[3] Ward v. Hobbs, 3 Q. B. Div. 150, 4 App. Cas. 13; Beninger v. Corwin, 24 N. J. Law, 257; Paul v. Hadley, 23 Barb. (N. Y.) 521; Morris v. Thompson, 85 Ill. 16. *See "Sales," Dec. Dig. (Key-No.) § 41; Cent. Dig. § 84.*

[4] Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Marsh v. Webber, 13 Minn. 109 (Gil. 99); Cecil v. Spurger, 32 Mo. 462, 82 Am. Dec. 140; Patterson v. Kirkland, 34 Miss. 423; Johnson v. Wallower, 18 Minn. 288 (Gil. 262); Cardwell v. McClelland, 3 Sneed (Tenn.) 150; Waters v. Mattingley, 1 Bibb (Ky.) 244, 4 Am. Dec. 631; Maynard v. Maynard, 49 Vt. 297; Paddock v. Strobridge, 29 Vt. 470; Graham v. Stiles, 38 Vt. 578; Dowling v. Lawrence, 58 Wis. 282, 16 N. W. 552. Sale of cattle known to be infected with contagious disease: Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; GRIGSBY v. STAPLETON, 94 Mo. 423, 7 S. W. 421, Throckmorton, Cas. Contracts, 187. The rule does not apply if the sale is "with all faults." West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737; Whitney v. Boardman, 118 Mass. 242. Otherwise if seller makes efforts to prevent buyer from discovering defects. West v. Anderson, supra; note 98, supra. *See "Sales," Dec. Dig. (Key-No.) § 41; Cent. Dig. § 84.*

[5] Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122; Cesar v. Karutz, 60 N. Y. 229, 19 Am. Rep. 164; Cutler v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429. *See "Sales," Dec. Dig. (Key-No.) § 41; Cent. Dig. § 84.*

[6] Scott v. Littledale, 8 El. & Bl. 815; People's Bank v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214; Borden v. Railroad Co., 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632; Griffin v. O'Neil, 48 Kan. 117, 29 Pac. 143; Seeley v. Traction Co., 179 Pa. 334, 36 Atl. 229; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[7] Anson, Cont. (8th Ed.) 138.

reason to know it, the contract is voidable.[8] Thus where a person was sued for refusing to accept some oats which he had agreed to buy from the plaintiff, on the ground that he had agreed and intended to buy old oats, and that those supplied were new, the jury were told that, if the plaintiff knew that the defendant "thought he was buying old oats," then he could not recover. The court of review, however, held that this was not enough to avoid the sale; that in order to do so the plaintiff must have known that the defendant "thought he was being promised old oats." It was not knowledge of the misapprehension of the quality of the oats, but knowledge of the misapprehension of the quality promised, which would defeat a recovery.[9] So where the seller, intending to offer cattle for $261.50, by a slip of the tongue offered them for $161.50, and the buyer, having good reason to suppose that the price named was a mistake, accepted the offer and paid $20 on account, and the seller tendered back the $20, and repudiated the sale, it was held that the buyer was not entitled to maintain replevin.[10] And where by mistake the plaintiff in compiling a rate sheet printed the fare at $21.25 instead of $36.70, and the defendant, who had discovered the mistake, purchased tickets at the printed price, it was held that the plaintiff could rescind.[11]

This subject is treated by Sir William Anson and many other writers under mistake, but most of the courts of this country treat it as a question of fraud. The latter classification would seem the more appropriate, since the effect of a mistake of the character under consideration is merely to render the contract voidable, and not void.

[8] Smith v. Hughes, L. R. 6 Q. B. 597; Thayer v. Knote, 59 Kan. 181, 52 Pac. 433. Sir William Anson says "void." Anson, Cont. (8th Ed.) 138. *See "Sales," Dec. Dig. (Key-No.) § 36; Cent. Dig. §§ 63, 64.*

[9] Smith v. Hughes, supra. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[10] Harran v. Foley, 62 Wis. 584, 22 N. W. 837. See, also, Webster v. Cecil, 30 Beav. 62; Tamplin v. Jones, 15 Ch. D. 221; Gerrard v. Frankel, 30 Beav. 445; Everson v. Granite Co., 65 Vt. 658, 27 Atl. 320. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[11] Shelton v. Ellis, 70 Ga. 297. A contract to furnish the government with many articles at stipulated prices, among them shucks at 60 cents per pound, was unenforceable as to the shucks, where the government showed that they were worth from $12 to $35 per ton; that it was customary to buy them by the hundred weight; and that the seller failed to strike out the word "pounds" on the printed form of proposal, and to insert "hundred weight" instead, though the seller insisted that there was no mistake on his part. Hume v. United States, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393. See, also, Moffett, Hodgkins & Clarke Co. v. City of Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108. *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

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Character of Representations—Opinion or Expectation

To constitute fraud, the representation must be of a past or existing fact. What has been said in treating of misrepresentation is equally applicable here. A mere expression of opinion, belief, or expectation, however unfounded, will not invalidate a contract, nor give cause for an action for deceit.[12]

If, for instance, the seller of property says it is worth so much, this is a mere expression of opinion upon which the buyer may or may not act, just as he chooses.[13] So, also, where a person makes a false representation as to the harvest which land sown in certain crops will produce,[14] or as to the cubic contents of a piece of grading which he employs another to do,[15] or as to what it will cost to build a house,[16] these are all mere expressions of opinion, and, as a rule, do not amount to fraud.[17] A statement

[12] GORDON v. PARMELEE, 2 Allen (Mass.) 212, Throckmorton, Cas. Contracts, 189; Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Mooney v. Miller, 102 Mass. 217; Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105; Allen v. Hart, 72 Ill. 104; Buschman v. Codd, 52 Md. 207; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Beard v. Bliley, 3 Colo. App. 479, 34 Pac. 271; Montreal Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Nash v. Trust Co., 159 Mass. 437, 34 N. E. 625; Reeves v. Corning (C. C.) 51 Fed. 774. But see Grim v. Byrd, 32 Grat. (Va.) 293, 301, where it is said, per Staples, J.: "But even a matter of opinion may amount to an affirmation, and be the inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other." *See "Contracts," Dec. Dig. (Key-No.) § 93; Cent. Dig. §§ 415–419.*

[13] Lindsay Pet. Co. v. Hurd, L. R. 5 P. C. 243; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367; Johnson v. Seymour, 79 Mich. 156, 44 N. W. 344; Geddes' Appeal, 80 Pa. 442; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Belz v. Keller (Ky.) 1 S. W. 420; Noetling v. Wright, 72 Ill. 390; Lockwood v. Fitts, 90 Ala. 150, 7 South. 467; Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Cagney v. Cuson, 77 Ind. 494; Lynch v. Murphy, 171 Mass. 307, 50 N. E. 623. *See "Sales," Dec. Dig. (Key-No.) § 43; Cent. Dig. §§ 86–100.*

[14] Holton v. Noble, 83 Cal. 7, 23 Pac. 58. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[15] East v. Worthington, 88 Ala. 537, 7 South. 189. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[16] Sweney v. Davidson, 68 Iowa, 386, 27 N. W. 278. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[17] Representations as to the speed of a horse not made as of personal knowledge. State v. Cass, 52 N. J. Law, 77, 18 Atl. 972. Representation that a stallion will not produce sorrel colts. Scroggin v. Wood, 87 Iowa, 497, 54 N. W. 437. Representations as to solvency and credit. See Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; Yeager Milling Co. v. Lawler, 39 La. Ann. 572, 2 South. 398; Childs v. Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

as to the dimensions of land is a statement of fact;[18] but where the boundaries are correctly pointed out, a representation as to the area embraced therein is an expression of opinion.[19]

Same—Statement of Intention, Expectation, or Promises

A representation of fact is a statement that a thing was or is, and does not, therefore, include expressions of intention or expectation, or promises, or other representations that a thing shall be.[20] Notwithstanding this, a representation of intention may amount to a fraudulent representation. The law makes a distinction between a promise which the promisor, when he makes it, intends to perform, and one which he intends to break. In the first case he represents truly enough his intention that something shall take place in the future, while in the second case he misrepresents his existing intention. He not merely makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be other than it really it.[21] It is therefore, as we have already seen, very generally held that if a man buys goods, not intending at the time to pay for them, he makes a fraudulent representation.[22]

Same—Misrepresentation of Law

As a rule, misrepresentation of law does not amount to a fraudulent representation for which an action of deceit will lie, nor make

And see post, p. 280. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) §§ 11, 13; Cent. Dig. §§ 3, 5, 12, 13.*

[18] Elchelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 Pac. 117. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 34, 113; Cent. Dig. §§ 39, 201.*

[19] GORDON v. PARMELEE, 2 Allen (Mass.) 212, Throckmorton, Cas. Contracts, 189. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 34; Cent. Dig. § 39.*

[20] Dawe v. Morris, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; Burrell's Case, 1 Ch. Div. 552; Knowlton v. Keenan, 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282; Saunders v. McClintock, 46 Mo. App. 216; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; Balue v. Taylor, 136 Ind. 368, 36 N. E. 269; Birmingham Warehouse & Elevator Co. v. Land Co., 93 Ala. 549, 9 South. 235; Huber v. Guggenheim (C. C.) 89 Fed. 598. But see Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Moore v. Cross (Tex. Civ. App.) 26 S. W. 122. Representation that stock sold will pay a certain dividend. Robertson v. Parks, 76 Md. 118, 24 Atl. 411. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[21] Old Colony Trust Co. v. Traction Co. (C. C.) 89 Fed. 794; Russ Lumber & Mill Co. v. Water Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186; Southern Loan & Trust Co. v. Gissendaner, 4 Ala. App. 523, 58 South. 737; Mutual Reserve Life Ins. Co. v. Seidel, 52 Tex. Civ. App. 278, 113 S. W. 945. Contra: Miller v. Sutliff, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[22] Ante, p. 274.

a contract voidable. A contract, therefore, cannot, unless there are peculiar circumstances of fraud, or a relation of trust and confidence between the parties,[23] be rescinded by one party on the ground that the other falsely represented the legal effect of the contract, or otherwise misrepresented the law.[24] As already stated, private right of ownership, although it be the result also of a matter of law, is regarded as matter of fact, and ignorance of foreign laws, which include the laws of a sister state, is regarded as ignorance of fact, and misrepresentation in regard to either is misrepresentation of fact.[25]

Same—Materiality

Not only must the representation be of a fact, but it must be of a material fact. A false representation of an immaterial fact, whatever may have been the intention, has no effect.[26] It may often be difficult to say when a representation is material, but it is probably safe to say that it is always material if, had it been known to be false, the contract would not have been entered into.[27]

Same—Made by Party to Contract

In order that false representations may affect the validity of a contract, they must be made by a party to the contract, or by his

[23] Berry v. Whitney, 40 Mich. 71; Havilland v. Willets, 141 N. Y. 35, 35 N. E. 958; Motherway v. Wall, 168 Mass. 333, 47 N. E. 135. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[24] Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Fish v. Cleland, 33 Ill. 238; Wheaton v. Wheaton, 9 Conn. 96; Grant v. Grant, 56 Me. 573; Bank of United States v. Daniel, 12 Pet. 32, 9 L. Ed. 989; Pinkham v. Gear, 3 N. H. 163; Clem v. Railroad Co., 9 Ind. 488, 68 Am. Dec. 653; Ætna Ins. Co. v. Reed, 33 Ohio St. 293; Townsend v. Cowles, 31 Ala. 428; Sims v. Ferrill, 45 Ga. 585; Starr v. Bennett, 5 Hill (N. Y.) 303; Moreland v. Atchison, 19 Tex. 303; People v. Supervisors, 27 Cal. 655; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Burk v. Johnson, 146 Fed. 209, 76 C. C. A. 567. But see Underwood v. Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Fitzgerald v. Peck, 4 Litt. (Ky.) 125; Lowndes v. Chisolm, 2 McCord, Eq. (S. C.) 455, 16 Am. Dec. 667. False representation by the lessor of property that the lessee will have the right to sell intoxicating liquors therein. Gormely v. Association, 55 Wis. 350, 13 N. W. 242. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[25] Ante, p. 256.

[26] Young v. Young, 113 Ill. 430; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; Geddes v. Pennington, 5 Dow. 159; Davis v. Davis, 97 Mich. 419, 56 N. W. 774; Nounnan v. Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; Winston v. Young, 52 Minn. 1, 53 N. W. 1015; Palmer v. Bell, 85 Me. 352, 27 Atl. 250; Curtiss v. Howell, 39 N. Y. 211. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[27] McAleer v. Horsey, 35 Md. 439; Powers v. Fowler, 157 Mass. 318, 32 N. E. 166; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; Post, p. 288. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

authority. A party to a contract may not have it set aside because of the fraud of a third person, not the agent of the other party, nor acting in collusion with him.[28]

Right to Rely on Statements

In order that a person may be entitled to rescind or maintain an action for deceit, the representations must have been of such a character, and must have been made under such circumstances, that he had a right to rely on them. Representations, for instance, amounting merely to commendatory expressions, or exaggerated statements as to value, or prospects, or the like, as where a seller puffs up the value and quality of his goods, or a man, to induce another to contract with him, holds out flattering prospects of gain, are not regarded as fraudulent.[29]

Simplex commendatio non obligat. As we have seen, the buyer of property is not justified in relying on the seller's representation as to its value.[30] Some of the courts hold, however, that a statement by the seller of property that he gave so much for it is a representation of fact upon which the buyer may rely, and that, if it is knowingly false, it amounts to fraud.[31] Other courts hold that such a statement is merely a commendatory expression, on which the buyer must not rely.[32] But, even where the statement would ordinarily be regarded as a mere commendatory expression [33] or ex-

[28] Cason v. Cason, 116 Tenn. 173, 93 S. W. 89. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[29] GORDON v. PARMELEE, 2 Allen (Mass.) 212, Throckmorton Cas. Contracts, 189; Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Hughes v. Manufacturing Co., 84 Md. 318; Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113; Lockwood v. Fitts, 90 Ala. 150, 7 South. 467; Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Jackson v. Collins, 39 Mich. 557; Burns v. Mahannah, 39 Kan. 87, 17 Pac. 319; Patten v. Glatz (C. C.) 87 Fed. 283; Macklem v. Fales, 130 Mich. 66, 89 N. W. 581 (representations as to future possibilities). See the cases cited in notes 56, 12, supra. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[30] Ante, p. 279.

[31] Sandford v. Handy, 23 Wend. (N. Y.) 260; Pendergast v. Reed, 29 Md. 398, 96 Am. Dec. 539; Salm v. Israel, 74 Iowa, 314, 37 N. W. 387; Weidner v. Phillips, 39 Hun (N. Y.) 1; Ives v. Carter, 24 Conn. 392; Strickland v. Graybill, 97 Va. 602, 34 S. E. 475. *See "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

[32] Tuck v. Downing, 76 Ill. 71; Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Cooper v. Lovering, 106 Mass. 77; Hemmer v. Cooper, 8 Allen (Mass.) 334; Bishop v. Small, 63 Me. 12; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Sowers v. Parker, 59 Kan. 12, 51 Pac. 888. See, also, Cole v. Smith, 26 Colo. 506, 58 Pac. 1086. *See "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

[33] Teachout v. Van Hoesen, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14

pression of opinion,[84] the circumstances may be such as to justify the other party in relying on it, as, for instance, where the parties do not meet on equal terms by reason of the possession of special knowledge by the party making the statement, or there is a relation of confidence between them. In such a case the statement may be fraudulent.

Same—Credulity and Negligence of Party Defrauded

It would seem upon principle that a person cannot avoid the effect of his fraudulent misrepresentation on the ground of the credulity of the injured party or of his negligence in failing to ascertain the facts, and many cases so hold.[85] Thus it is very generally held that a man may act upon a representation of fact, although means of obtaining knowledge are at hand and open to him.[86] "Every

Am. St. Rep. 206; Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416; Jackson v. Collins, 39 Mich. 557; Paetz v. Stoppleman, 75 Wis. 510, 44 N. W. 834; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722; Horton v. Lee, 106 Wis. 439, 82 N. W. 360. *See "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

[84] Hedin v. Institute, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Robbins v. Barton, 50 Kan. 120, 31 Pac. 686; Vilett v. Moler, 82 Minn. 12, 84 N. W. 452. *See "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

[85] Redgrave v. Hurd, 20 Ch. Div. 1; Jackson v. Collins, 39 Mich. 557; Kendall v. Wilson, 41 Vt. 567; Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. 832; Linington v. Strong, 107 Ill. 295; Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; Warder, Bushnell & Glessner Co. v. Whitish, 77 Wis. 430, 46 N. W. 540; Sutton v. Morgan, 158 Pa. 204, 27 Atl. 894, 38 Am. St. Rep. 841; McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Blacknall v. Rowland, 108 N. C. 554, 13 S. E. 191; Fargo Gas & Coke Co. v. Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; Wilson v. Carpenter's Adm'r, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; Strand v. Griffith, 97 Fed. 854, 38 C. C. A. 444; Leonard v. Southern Power Co., 155 N. C. 10, 70 S. E. 1061; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99, 120; Crompton v. Beedle, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399 (where it is said, per Haselton, J.: "Any different doctrine, carried to its logical conclusion, would facilitate transactions in gold bricks, salted mines, bogus diamonds as real, fac similes as originals, and would permit a variety of things destructive of commercial integrity"). *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[86] Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736; Clark v. Ralls (Iowa) 24 N. W. 567; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 744; Rohrof v. Schulte, 154 Ind. 183, 55 N. E. 427; Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798; Wheeler v. Baars, 33 Fla. 696, 15 South. 584; Lovejoy v. Isbell, 73 Conn. 368, 47 Atl. 682. Negligence is, of course, no defense, in the case of negotiable paper, against innocent purchasers. Ante, p. 247. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 19–23.*

contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract has deliberately pledged his faith." [87] On the other hand, by many courts it is laid down in broad terms that if the means of knowledge are at hand and equally available to both parties, and the subject of the contract is open to the inspection of both, the party to whom the representation is made will not be heard to say that he has been deceived thereby, if he has not availed himself of such means of knowledge.[88] This conflict of authority is illustrated by the opposite decisions which have been reached in cases involving the liability of a person who has been fraudulently induced to execute an instrument upon misrepresentation of the other party as to its character or terms. Doubtless a person who fails to read an instrument before signing it is wanting in ordinary prudence, but it has been held by many courts that he is not precluded thereby from asserting the invalidity of the contract as against the party who

[87] Mead v. Bunn, 32 N. Y. 275. But see Long v. Warren, 68 N. Y. 426; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755, 757. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[88] Slaughter's Adm'r v. Gerson, 13 Wall. 379, 20 L. Ed. 627; Salem India-Rubber Co. v. Adams, 23 Pick. (Mass.) 256, 265; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215; Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Palmer v. Bell, 85 Me. 352, 27 Atl. 250, 251; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755, 757; Washington Cent. Imp. Co. v. Newlands, 11 Wash. 212, 39 Pac. 366; South Milwaukee Boulevard Heights Co. v. Harte, 95 Wis. 592, 70 N. W. 821. See, also, Hingston v. L. P. & J. A. Smith Co., 114 Fed. 294, 52 C. C. A. 206.

"The requirement, as it has been worked out, does not call for more than reasonable diligence (Holst v. Stewart, 161 Mass. 516, 522, 37 N. E. 755, 42 Am. St. Rep. 442; Brown v. Leach, 107 Mass. 364, 368; Nowlan v. Cain, 3 Allen [Mass.] 261, 264); and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury (Holst v. Stewart, 161 Mass. 516, 522, 523, 37 N. E. 755, 42 Am. St. Rep. 442). See Burns v. Lane, 138 Mass. 350, 355, 356; Whiteside v. Brawley, 152 Mass. 133, 24 N. E. 1088. The matter may have been confused a little by not distinguishing between sellers' talk as to the value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts concerning which even sellers may be held liable for fraud, and as to which the buyers may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases." Per Holmes, J., in Whiting v. Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 19–23.*

has thus procured the execution by fraud.[39] By other courts it has been held that the party so signing is precluded by his negligence from asserting the invalidity of the contract.[40]

Knowledge of Falsity—Recklessness

A representation is fraudulent if it is made with knowledge of its falsity or without belief in its truth. The mere absence of belief is enough, and hence, if a man makes a misrepresentation in reckless disregard whether it is true or not, the representation is fraudulent, for he can have no belief in the truth of what he asserts.[41] And if a man falsely asserts a fact as true of his own knowledge when he has no knowledge, it is none the less fraudulent because he believes it to be true. Probably it is the prevailing rule in this country that an unqualified statement of a material fact susceptible of actual knowledge is to be taken as a representation as of one's own knowledge, and that such a representation if false is fraudulent, notwithstanding belief in its truth.[42] In Eng-

[39] Alfred Shrimpton & Sons v. Philbrick, 53 Minn. 366, 55 N. W. 551; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Burroughs v. Guano Co., 81 Ala. 255, 1 South. 212; Smith v. Smith, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. Rep. 617; Kingman v. Reinemer, 166 Ill. 208, 46 N. E. 786; Alexander v. Brogley, 63 N. J. Law, 307, 43 Atl. 888; Woodbridge v. De Witt, 51 Neb. 98, 70 N. W. 506; McBride v. Publishing Co., 102 Ga. 422, 30 S. E. 999; Shook v. Puritan Mfg. Co., 75 Kan. 301, 89 Pac. 653, 8 L. R. A. (N. S.) 1043; Birdsall v. Coon, 157 Mo. App. 439, 139 S. W. 243. See, also, Louisville & N. R. Co. v. Cooper (Ky.) 56 S. W. 144; Story v. Gammell, 68 Neb. 709, 94 N. W. 982. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[40] Taylor v. Fleckenstein (C. C.) 30 Fed. 99; Keller v. Orr, 106 Ind. 406, 7 N. E. 195; Wallace v. Railway Co., 67 Iowa, 547, 25 N. W. 772; Dowagiac Mfg. Co. v. Schroeder, 108 Wis. 109, 84 N. W. 14; Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067; Binford v. Bruso, 22 Ind. App. 512, 54 N. E. 146. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[41] Per Lord Cairns, in Reese River Min. Co. v. Smith, L. R. 4 H. L. 79; STIMSON v. HELPS, 9 Colo. 33, 10 Pac. 290, Throckmorton Cas. Contracts, 193; Fisher v. Mellen, 103 Mass. 503; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Stone v. Denny, 4 Metc. (Mass.) 151; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Bennett v. Judson, 21 N. Y. 238; Marsh v. Falker, 40 N. Y. 562; Allen v. Hart, 72 Ill. 104; Case v. Ayers, 65 Ill. 142; Stone v. Covell, 29 Mich. 359; Bristol v. Braidwood, 28 Mich. 191; Walsh v. Morse, 80 Mo. 568; Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. 473; Indianapolis, P. & C. R. Co. v. Tyng, 63 N. Y. 653; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Ruff v. Jarrett, 94 Ill. 475; Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; Bower v. Fenn, 90 Pa. 359, 35 Am. Rep. 662; Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832; Krause v. Busacker, 105 Wis. 350, 81 N. W. 406. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 3–5.*

[42] Litchfield v. Hutchinson, 117 Mass. 197; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (Cf. Goodwin v. Trust Co., 152 Mass. 189, 25 N. E. 100); Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. 139; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am.

land, on the other hand, and in some states it is held that a statement made in the honest belief that it is true is not fraudulent, notwithstanding absence of reasonable grounds for believing it to be true.[43] The absence of such grounds can only go to show that the belief was not entertained.[44]

The fact that the party making the representation professed to rely on the representations of others, and gave the source of his information, is immaterial, if he knew, or had reason to believe, that they were untrue.[45]

Intention

The representation must have been made with the intention that it should be acted upon by the injured party.[46] Another statement of this rule is that the representation must be made as part of the same transaction.[47]

St. Rep. 485; Montreal Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; State v. Cass, 52 N. J. Law, 77, 18 Atl. 972; Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516; Rothschild v. Mack, 115 N. Y. 1, 21 N. E. 726; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923; Braley v. Powers, 92 Me. 203, 42 Atl. 362; Walters v. Eaves, 105 Ga. 584, 32 S. E. 609; Simon v. Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; New London Water Com'rs v. Robbins, 82 Conn. 623, 74 Atl. 938; Tolley v. Potect, 62 W. Va. 231, 57 S. E. 811; Grim v. Byre, 32 Grat. (Va.) 293. The fraud in such a case "consists in stating that the party knows the thing to exist when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." Chatham Furnace Co. v. Moffatt, supra. And see Alvarez v. Brannan, 7 Cal. 503, 68 Am. Dec. 274. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 3–5.*

[43] Derry v. Peek, 14 App. Cas. 337; Merwin v. Arbuckle, 81 Ill. 501; Cox v. Highley, 100 Pa. 249; Lamberton v. Dunham, 165 Pa. 129, 30 Atl. 716; Wilcox v. University, 32 Iowa, 367; Lord v. Goddard, 13 How. 198, 14 L. Ed. 111; Pettigrew v. Chellis, 41 N. H. 95; Scroggin v. Wood, 87 Iowa, 497, 54 N. W. 437; Sylvester v. Henrich, 93 Iowa, 489, 61 N. W. 942; Morton v. Scull, 23 Ark. 289; Farmers' Stock Breeding Ass'n v. Scott, 53 Kan. 534, 36 Pac. 978. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[44] Anson, Cont. (8th Ed.) 172.

[45] Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 19–23.*

[46] Buschman v. Codd, 52 Md. 202; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Bach v. Tuck, 57 Hun, 588, 10 N. Y. Supp. 884; Carter v. Harden, 78 Me. 528, 7 Atl. 392; Thorp v. Smith, 18 Wash. 277, 51 Pac. 381. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 2.*

[47] Pollock, Cont. (3d Ed.) 545; Barnett v. Barnett, 83 Va. 504, 2 S. E. 733. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

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The representation need not, indeed, have been made to the injured party himself. If a person, desiring to enter into a contract with another, should make a representation to a third person with the intention that it should reach the ears of such other person, and be acted upon by him, in entering into the contract, this would constitute a fraudulent misrepresentation equally as if it had been made to the other party.[48] Where a gun was sold to a man for the use of himself and sons, the seller falsely representing that it had been made by a certain maker, and was a good, safe, and secure gun, it was held that a son of the buyer who was injured by the gun's exploding could sue the seller for deceit. In that case it was argued that the defendant could not be held liable to the plaintiff for a representation not made to him; but the court held that inasmuch as the gun was sold to the father to be used by the plaintiff, and there was a false representation to effect the sale, and "as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results," the defendant was liable.[49] So, also, where a merchant makes a false statement as to his financial responsibility to a mercantile agency for the purpose of procuring credit, and customers of the agency, in reliance thereon, give him credit, and are defrauded, they may maintain an action of deceit against him, or avoid their contract with him on the ground of fraud.[50]

The representation, however, must have been made with the intention that it should be acted upon by the injured party in the manner that occasions the injury.[51] Thus, where the directors of a company made false statements in the prospectus of the company, which would have made them liable to the original allotters of

[48] Langridge v. Levy, 2 Mees. & W. 519; Snow v. Judson, 38 Barb. (N. Y.) 210; Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[49] Langridge v. Levy, 2 Mees. & W. 519. *See "Sales," Dec. Dig. (Key-No.) § 40; Cent. Dig. §§ 79–83.*

[50] Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103; Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790; Gainesville Nat. Bank v. Bramberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; P. Cox Shoe Co. v. Adams, 105 Iowa, 402, 75 N. W. 316; STEVENS v. LUDLUM, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210, Throckmorton Cas. Contracts, 192. *See "Sales," Dec. Dig. (Key-No.) §§ 46, 47; Cent. Dig. §§ 95, 96.*

[51] Barry v. Crosky, 2 Johns. & H. 1. *See "Fraud," Dec. Dig. (Key-No.) §§ 21, 22; Cent. Dig. §§ 9–23.*

shares, they were held not to be liable to persons who subsequently purchased shares which came into the market, on the ground that their intention to deceive could not be supposed to extend beyond the original applicants for shares.[52] The directors in such a case would be liable to the original applicants for shares, relying on the prospectus.[53]

Same—Dishonesty of Motive

If a person makes a representation which was fraudulent as has been above explained, it is immaterial that he may not have been actuated by any dishonest motive. If a man chooses to make such assertions, hoping or even believing that all will turn out well, he cannot escape the results of his fraud by showing the excellence of his motives.[54] Thus, where a person accepted a bill of exchange drawn on another person, and falsely represented that he had authority from that other to do so, he was held liable in an action of deceit brought against him by an indorsee, the acceptance having been repudiated by the drawee and the bill dishonored; and the fact that the defendant honestly believed that the acceptance would be sanctioned by the drawee, and the bill paid, was held immaterial.[55]

Representation must Deceive

A false representation, to constitute fraud, must actually deceive; that is, it must be relied on by the other party, and must induce him to act to his prejudice. If it is not believed, or the party disregards

[52] Peek v. Gurney, L. R. 6 H. L. 377, 410. And see Nash v. Trust Co., 159 Mass. 437, 34 N. E. 625; Davidson v. Nichols, 11 Allen (Mass.) 514. It has been held that it could not be said, as a matter of law, that false representations concerning the value of certain stock, by which a person was induced to buy, may not have continued in his mind, and induced him to buy more of the stock a year later. Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938. *See "Corporations," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 244–264.*

[53] Reese River Min. Co. v. Smith, 4 H. L. Cas. 64; Vreeland v. Stone Co., 29 N. J. Eq. 188. *See "Corporations," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 244–264.*

[54] Polhill v. Walter, 3 Barn. & Adol. 114. A buyer of goods cannot avoid the effect of knowingly false statements as to his financial condition by showing that he intended and expected to pay for them. Judd v. Weber, 55 Conn. 267, 11 Atl. 40. See, also, ante, p. 274. Although the maker of the representation believes it to be true, if he discovers that it is false before it is acted on, and does not disclose the fact, he is guilty of fraud. Loewer v. Harris, 57 Fed. 368, 6 C. C. A. 394; Guilford School Tp. v. Roberts, 28 Ind. App. 355, 62 N. E. 711. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Fraud," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 3–5.*

[55] Polhill v. Walter, 3 Barn. & Adol. 114. *See "Fraud," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 3–5.*

it, and makes inquiries for himself, there is no fraud.[56] In a leading case on this subject it appeared that the defendant had bought a cannon from the plaintiff, having a defect in it which rendered it worthless, and the plaintiff had endeavored to conceal the defect by inserting a metal plug in the weak spot. The defendant never inspected the cannon. He accepted it, and, in using it, it burst. It was held that the attempted fraud, having had no operation upon the mind of the defendant, did not exonerate him from paying for the gun. "If," said the court, "the plug which it was said was put in to conceal the defect had never been there, his position would have been the same; for, as he did not examine the gun, or form any opinion as to whether it was sound, its condition did not affect him." [57] If the representation was one calculated to induce the other party to make the contract, the presumption is that he was influenced by it; and, in order to take away his right to relief on the ground of fraud, it must be shown that he did not rely on it.[58]

The representation need not have been the sole inducement to enter into the contract. If it was a material inducement—that is, if it so contributed as an inducement that without it the contract would not have been made—it is sufficient.[59]

[56] Arkwright v. Newbold, 17 Ch. Div. 324; Ming v. Woolfolk, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315; Priest v. White, 89 Mo. 609, 1 S. W. 361; Buschman v. Codd, 52 Md. 202; Farrar v. Churchill, 135 U. S. 616, 10 Sup. Ct. 771, 34 L. Ed. 246; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915; Cobb v. Wright, 43 Minn. 83, 44 N. W. 662; Wimer v. Smith, 22 Or. 469, 30 Pac. 416; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Darby v. Kroell, 92 Ala. 607, 8 South. 384; Pratt v. Burhans, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703; Fowler v. McCann, 86 Wis. 427, 56 N. W. 1085; Black v. Black, 110 N. C. 398, 14 S. E. 971; Dady v. Condit, 163 Ill. 511, 45 N. E. 224; Brady v. Evans, 78 Fed. 558, 24 C. C. A. 236; Wagner v. Insurance Co., 90 Fed. 395, 33 C. C. A. 121. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[57] Horsfall v. Thomas, 1 Hurl. & C. 90, 99. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430; "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

[58] Redgrave v. Hurd, 20 Ch. Div. App. 21; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Garrison v. Electrical Works, 59 N. J. Eq. 440, 45 Atl. 612; Dashiel v. Harshman, 113 Iowa, 283, 85 N. W. 88; Grim v. Byrd, 32 Grat. (Va.) 293. *See "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

[59] JAMES v. HODSDEN, 47 Vt. 127, Throckmorton Cas. Contracts, 195, in which it is said, per Redfield, J.: "It is enough that the party was deceived and cheated and the defendant's falsehood and fraudulent practices contributed to that end;" Peek v. Derry, 37 Ch. Div. 541, L. R. 14 App. Cas. 337; Safford v. Grout, 120 Mass. 20; Burr v. Willson, 22 Minn. 206; Lebby

Injury must Result

It is essential, in order to sustain an action of deceit, or to give a party the right to avoid a contract on the ground of fraud, that he shall have been prejudiced or injured by the fraud.[60] Where, for instance, a person was induced to exchange his property for shares of stock by false representations of the other party, but the stock was worth what he gave for it, so that he suffered no injury, it was held that he could not maintain an action for deceit.[61] And, in a case in which the seller of property had falsely represented that there was no mortgage thereon, it was held that the purchaser could not avoid the sale, where the seller had the mortgage released as soon as his attention was called to it.[62]

SAME—EFFECT—REMEDIES

140. Fraud renders a contract, not void, but merely voidable at the option of the party injured. Therefore,
   (a) He may affirm the contract, and sue for damages for the deceit, or, if sued on the contract, set up the fraud in reduction of the demand.
   (b) He may rescind the contract, and
      (1) Sue for damages for the deceit;
      (2) Sue to recover what he has parted with;
      (3) Resist an action at law on the contract;
      (4) Resist a suit in equity for specific performance, or
      (5) Sue in equity to have the contract avoided judicially.

141. There are the following limitations to a party's right to rescind a contract for fraud:
   (a) He cannot rescind after affirming it by accepting its benefits, or by suing or otherwise acting upon it after discovery of the fraud.

v. Ahrens, 26 S. C. 275, 2 S. E. 387; Saunders v. McClintock, 46 Mo. App. 216; Strong v. Strong, 102 N. Y. 69, 5 N. E. 799; Ruff v. Jarrett, 94 Ill. 475; Moline-Milburn Co. v. Franklin, 37 Minn. 137, 33 N. W. 323. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[60] Schubart v. Coke Co., 41 Ill. App. 181; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Lorenzen v. Investment Co., 44 Neb. 99, 62 N. W. 231; Bomar v. Rosser, 131 Ala. 215, 31 South. 430. But see Northrop v. Hill, 57 N. Y. 351, 15 Am. Rep. 501. *See "Contracts," Dec. Dig. (Key-No.) § 94; Cent. Dig. §§ 420–430.*

[61] Alden v. Wright, 47 Minn. 225, 49 N. W. 767, and cases there cited. *See "Fraud," Dec. Dig. (Key-No.) § 25; Cent. Dig. § 24.*

[62] Johnson v. Seymour, 79 Mich. 156, 44 N. W. 344. And see Beard v. Billey, 3 Colo. App. 479, 34 Pac. 271. Cf. Stevenson v. Marble (C. C.) 84 Fed. 23. *See "Sales," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 65–85.*

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(b) Delay in rescinding after discovery of the fraud, or after it should have been discovered, may amount to an affirmance at law, and may bar relief in equity on the ground of laches.

(c) The consideration must be returned as a condition precedent to the right to rescind; and, as a rule, there can be no rescission if the subject-matter of the contract has been so dealt with that the parties cannot be placed in statu quo.

EXCEPTIONS—(1) This rule does not apply where the consideration has been destroyed, or taken from the injured party's control, without his fault.

(2) Where it is of no value whatever.

(3) Provided the consideration is returned, the fraudulent party need not be placed in as good a position as he before occupied, if, by reason of his own act, it is impossible to do so.

(4) If, by natural causes, or reasonable use, the value of the consideration has diminished, it may be returned in its depreciated condition.

(d) The right to rescind may be defeated by a third person's having acquired an interest under the contract for value, and without notice of the fraud.

Fraud does not render the contract void, but renders it only voidable at the option of the party defrauded.[63] In other words, it is valid until rescinded. It is for the party defrauded to elect whether he will be bound.[64] He therefore has several remedies on discovering the fraud:

First. He may affirm the contract, and bring an action for deceit to recover such damages as the fraud has occasioned him, or set up such damages by way of recoupment or counterclaim, if sued upon the contract by the other party.[65] For instance, the defraud-

[63] ROWLEY v. BIGELOW, 12 Pick. (Mass.) 307, 23 Am. Dec. 607, Throckmorton, Cas. Contracts, 196; Baird v. Mayor, 96 N. Y. 567; Smith v. Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; Foreman v. Bigelow, 4 Cliff. 541, Fed. Cas. No. 4,934; Cobb v. Hatfield, 46 N. Y. 533; Wilson v. Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837. *See "Contracts," Dec. Dig. (Key-No.) § 98; Cent. Dig. § 447.*

[64] Rawlins v. Wickham, 3 De Gex & J. 322; Clough v. Railway Co., L. R. 7 Exch. 26; Tiffany, Sales, 119. *See "Contracts," Dec. Dig. (Key-No.) § 98; Cent. Dig. § 447.*

[65] Union Cent. Life Ins. Co. v. Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; Peck v. Brewer, 48 Ill. 54; Haven v. Neal, 43 Minn. 315, 45 N. W. 612; Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Nauman v. Oberle, 90 Mo. 666, 3 S. W. 380; Barr v. Kimball, 43 Neb. 766, 62 N. W. 196. But some cases hold that if, while the contract is still wholly or largely executory,

ed buyer, on discovering the fraud, may keep the goods, and bring an action for damages;[66] or, if he has not paid for them, he may set up the fraud when sued by the seller for the price.[67]

Second. He may rescind the contract, and (1) sue, in an action of deceit, for any damages he may have sustained by reason of the fraud;[68] or (2) if he has paid money under the contract, he may recover it back,[69] and if he has delivered goods or property he may maintain an action of replevin or trover;[70] or (3) he may resist an action at law brought against him on the contract;[71] or (4) he may resist a suit in equity by the other party for specific performance;[72] or (5) he may himself sue in equity to have the contract judicially canceled and set aside.[73]

the defrauded party learns of the fraud, and nevertheless continues to carry out the contract, exacting performance, and receiving benefits, he cannot maintain an action for the deceit. Kingman & Co. v. Stoddard, 85 Fed. 740, 29 C. C. A. 413; Simon v. Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. *See "Fraud," Dec. Dig. (Key-No.) §§ 31, 32; Cent. Dig. §§ 27, 28.*

[66] Houldsworth v. City of Glasgow Bank, 5 App. Cas. 323. *See "Sales," Dec. Dig. (Key-No.) § 404; Cent. Dig. §§ 1146–1155.*

[67] Applegarth v. Robertson, 65 Md. 493, 4 Atl. 896. *See "Sales," Dec. Dig. (Key-No.) § 348; Cent. Dig. §§ 973–986.*

[68] Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Peck v. Brewer, 48 Ill. 54. *See "Fraud," Dec. Dig. (Key-No.) §§ 31, 32; Cent. Dig. §§ 27, 28.*

[69] Clarke v. Dickson, El. Bl. & El. 148; Coolidge v. Brigham, 1 Metc. (Mass.) 547; Jordan & Davis v. Annex Corp., 109 Va. 625, 64 S. E. 1050, 17 Ann. Cas. 267. *See "Sales," Dec. Dig. (Key-No.) § 404; Cent. Dig. §§ 1146–1155.*

[70] Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Ferguson v. Carrington, 9 Barn. & C. 59; Lee v. Burnham, 82 Wis. 209, 52 N. W. 255; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Cary v. Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; Benesch v. Weil, 69 Md. 276, 14 Atl. 666; Barker v. Dinsmore, 72 Pa. 427, 13 Am. Rep. 697. *See "Sales," Dec. Dig. (Key-No.) §§ 316–318; Cent. Dig. §§ 890–898.*

[71] Clough v. Railway Co., L. R. 7 Exch. 26, 36; Olston v. Oregon Water Power & Ry. Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915. *See "Sales," Dec. Dig. (Key-No.) § 347; Cent. Dig. §§ 962–972.*

[72] Ratliff, v. Vandikes, 89 Va. 307, 15 S. E. 864; Friend v. Lamb, 152 Pa. 529, 25 Atl. 577, 34 Am. St. Rep. 672; McShane v. Hazlehurst, 50 Md. 107; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Brown v. Pitcairn, 148 Pa. 387, 24 Atl. 52, 33 Am. St. Rep. 834. *See "Specific Performance," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 160–171½.*

[73] Castle v. Kemp, 124 Ill. 307, 16 N. E. 255; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Burrows v. Wene (N. J.) 26 Atl. 890; Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Jackson v. Hodges, 24 Md. 468; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486. *See "Cancellation of Instruments," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 1.*

Limitations to Right to Rescind

As a rule, the defrauded party must elect to rescind within a reasonable time after discovering the fraud,[74] or, what amounts to the same thing, after he could have discovered it by the use of due diligence.[75] It has been said that mere lapse of time, in the absence of statutory regulation, will not bar his right to rescind, though it would be evidence tending to show an intention to affirm.[76] A delay in rescinding which is unreasonable in view of the particular circumstances, however, will generally be regarded, even at law, as an election to affirm,[77] and will bar relief in equity on the ground of laches.[78]

Any acts which unequivocally treat the contract as subsisting will constitute an affirmance. If, after discovering the fraud, the party injured acts on the contract by accepting some benefit under it, or otherwise, he affirms it, and cannot afterwards rescind, for after an affirmance the election is determined.[79] Bringing an action on the

[74] Johnson v. McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; Schiffer v. Dietz, 83 N. Y. 300; Strong v. Strong, 102 N. Y. 69, 5 N. E. 799; Bailey v. Fox, 78 Cal. 389, 20 Pac. 868; Young v. Arntze, 86 Ala. 116, 5 South. 253; Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420; Taylor v. Short, 107 Mo. 384, 17 S. W. 970; Rugan v. Sabin, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Conlan v. Roemer, 52 N. J. Law, 53, 18 Atl. 858; Foley v. Crow, 37 Md. 62; Fleming v. Hanley, 21 R. I. 141, 42 Atl. 520. Delay alone, without discovery of the fraud, will not bar the right to rescind. Smith's Adm'r v. Smith, 30 Vt. 139; Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; Bowman v. Patrick (C. C.) 36 Fed. 138; Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257. *See "Contracts," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1189, 1200.*

[75] Redgrave v. Hurd, 20 Ch. Div. 1; Georgia Pac. R. Co. v. Brooks, 66 Miss. 583, 6 South. 467; Bostwick v. Insurance Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705. *See "Contracts," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1189, 1200.*

[76] Anson, Cont. (8th Ed.) 177; Clough v. Railroad Co., L. R. 7 Exch. 35; Wicks v. Smith, 21 Kan. 412, 30 Am. Rep. 433. *See "Contracts," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1189, 1200.*

[77] Masson v. Bovet, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; Perry v. Pearson, 135 Ill. 218, 25 N. E. 636; Carroll v. People, 13 Ill. App. 206; note 74, supra. *See "Contracts," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1189, 1200.*

[78] Cox v. Montgomery, 36 Ill. 396; Perry v. Pearson, 135 Ill. 218, 25 N. E. 636; Whittaker v. Improvement Co., 34 W. Va. 217, 12 S. E. 507; Barnard v. Iron Co., 85 Tenn. 139, 2 S. W. 21; Burkle v. Levy, 70 Cal. 250, 11 Pac. 643; Wilkinson v. Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Coles v. Vanneman, 51 N. J. Eq. 323, 18 Atl. 468, 30 Atl. 422. *See "Contracts," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1189, 1270.*

[79] Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420; Lockwood v. Fitts, 90 Ala. 150, 7 South. 467; Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349; Eberstein v. Willets, 134 Ill. 101, 24 N. E. 967; Troup v. Appleman, 52 Md. 456; Wyeth v. Walzl, 43 Md. 426; Cobb v. Hat-

contract, or otherwise seeking to enforce it, after knowledge of the fraud, is an affirmance.[80] It is otherwise if an action is brought, or the contract otherwise acted upon, in ignorance of the fraud.[81] As already stated, an affirmance of the contract is no bar to an action to recover damages for the deceit.[82]

Return of Consideration—Placing in Statu Quo

The contract must be rescinded in toto; it cannot be rescinded in part and affirmed in part.[83] As a rule, therefore, it is a condition precedent to the right to rescind a contract on the ground of fraud that the party seeking to rescind shall return, or offer to return, what he has received under the contract;[84] and generally, if the subject-matter has been so dealt with, even before discovery of the fraud, that the parties cannot be reinstated in their former position,

field, 46 N. Y. 533; Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; Bach v. Tuch, 126 N. Y. 53, 26 N. E. 1019; Kennedy v. Bender (Tex. Civ. App.) 140 S. W. 491. *See "Contracts," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 442–446.*

[80] Bach v. Tuch, supra; Conrow v. Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Goodall v. Stewart, 65 Miss. 157, 3 South. 257; Mansfield v. Wilson (Ark.) 13 S. W. 598; Bedier v. Reaumé, 95 Mich. 518, 55 N. W. 366; Wheeler v. Dunn, 13 Colo. 428, 22 Pac. 827; Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006. *See "Contracts," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 442–446.*

[81] Lee v. Burnham, 82 Wis. 209, 52 N. W. 255; Equitable Co-op. Foundry Co. v. Hersee, 103 N. Y. 25, 9 N. E. 487; Hoyt Mfg. Co. v. Turner, 84 Ala. 523, 4 South. 658; Baker v. Maxwell, 99 Ala. 558, 14 South. 468. *See "Contracts," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 442–446.*

[82] Ante, p. 291; Gilchrist v. Manning, 54 Mich. 210, 19 N. W. 959; Mattock v. Reppy, 47 Ark. 148, 14 S. W. 546; Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790; Childs v. Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264; Union Cent. Life Ins. Co. v. Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; Wabash Valley Protective Union v. James, 8 Ind. App. 449, 35 N. E. 919; Teachout v. Van Hoesen, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206; Kennedy v. Bender (Tex. Civ. App.) 140 S. W. 491. *See "Contracts," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 442–446.*

[83] Brill v. Rack (Ky.) 23 S. W. 511; Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; ante, p. 212. And see the cases cited in the following notes. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

[84] Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; Estabrook v. Swett, 116 Mass. 303; Cobb v. Hatfield, 46 N. Y. 533; Thompson v. Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Babcock v. Case, 61 Pa. 427, 100 Am. Dec. 654; Young v. Arntze, 86 Ala. 116, 5 South. 253; Doughten v. Association, 41 N. J. Eq. 556, 7 Atl. 479; Cookingham v. Dusa, 41 Kan. 229, 21 Pac. 95; Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053; Balue v. Taylor, 136 Ind. 368, 36 N. E. 269; Freeman v. Kieffer, 101 Cal. 254, 35 Pac. 767; Moore v. Association, 165 Mass. 517, 43 N. E. 298; Friend Bros. Clothing Co. v. Hulbert, 98 Wis. 183, 73 N. W. 784; Breyfogle v. Walsh, 80 Fed. 172, 25 C. C. A. 357. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

the court will not allow a rescission, but will leave the matter to be adjusted by an action for damages by the party injured, or defense or counterclaim in an action by the other party.[85]

The defrauded party need not return what he has received, however, if it has been destroyed, or taken from his control, without fault on his part,[86] or if it is absolutely worthless.[87] Nor need he place the other party in the position which he before occupied, if, by reason of the latter's act, it is impossible to do so. All that can be required is that he return what he has himself received.[88] Mere depreciation in value of the thing received before discovery of the fraud will not defeat rescission;[89] and if in the meantime he has incurred expenses for repairs, he may, on rescission and return, recover the cost.[90]

Same—As Against Third Persons

. It follows from the principle that the contract is voidable, and not void, that, when innocent third persons have for value acquired rights under the contract, their rights are indefeasible. The rule is also said to be an application of the principle of convenience, that,

[85] Curtiss v. Howell, 39 N. Y. 211; Neal v. Reynolds, 38 Kan. 432, 16 Pac. 785; Rigdon v. Walcott, 141 Ill. 649, 31 N. E. 158; Stanton v. Hughes, 97 N. C. 318, 1 S. E. 852; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

[86] Neblett v. Macfarland, 92 U. S. 101, 23 L. Ed. 471; Flynn v. Allen, 57 Pa. 482; Hammond v. Pennock, 61 N. Y. 145; Henninger v. Heald, 51 N. J. Eq. 74, 26 Atl. 449; Groff v. Hansel, 33 Md. 161. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

[87] Fitz v. Bynum, 55 Cal. 459; Wicks v. Smith, 21 Kan. 412, 30 Am. Rep. 433; Babcock v. Case, 61 Pa. 427, 100 Am. Dec. 654. If the things received are capable of serving any purpose of advantage by their possession or control, or if their loss would be a disadvantage in any way, they must be returned. "This rule is held with great strictness in actions at law, as in the case of the casks that contained worthless lime (Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103), and the sack that covered the rejected bale of cotton (Morse v. Brackett, 98 Mass. 205; Id., 104 Mass. 494)." Bassett v. Brown, 105 Mass. 558. And see Evans v. Gale, 17 N. H. 573, 43 Am. Dec. 614. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

[88] Masson v. Bovet, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; Hammond v. Pennock, 61 N. Y. 145; Guckenheimer v. Angevine, 81 N. Y. 394; Gates v. Raymond, 106 Wis. 657, 82 N. W. 530. And see John V. Farwell Co. v. Hilton (C. C.) 84 Fed. 293, 39 L. R. A. 579. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

[89] Veazie v. Williams, 8 How. 134, 158, 12 L. Ed. 1018; Neblett v. Macfarland, 92 U. S. 101, 104, 23 L. Ed. 471; Baker v. Lever, 67 N. Y. 304, 23 Am. Rep. 117; Gatling v. Newell, 9 Ind. 574; Goodrich v. Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

[90] Farris v. Ware, 60 Me. 482. *See "Contracts," Dec. Dig. (Key-No.) § 266; Cent. Dig. § 1186.*

when one of two innocent persons must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.[91] Hence, a sale of land or goods cannot be rescinded so as to revest the property in the vendor if the vendee has in the meantime sold them to a bona fide purchaser.[92] The seller's remedy is by an action for damages.[93] The purchase must be for value, and hence the protection does not extend to attaching creditors,[94] to an assignee in bankruptcy,[95] or to a person taking the property in payment of an existing indebtedness.[96]

A sale, however, is to be distinguished from mere delivery of possession induced by fraud; for in the latter case the person obtaining possession acquires no property in the goods, and can pass none to a third person, however innocent. Thus, where a person obtains goods by fraudulently impersonating a third person,[97] or by pretending to be the agent of a third person,[98] to whom the owner sup-

[91] Pollock, Cont. (3d Ed.) 556; Tiffany, Sales, 122.

[92] ROWLEY v. BIGELOW, 12 Pick. (Mass.) 307, 23 Am. Dec. 607, Throckmorton Cas. Contracts, 196. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 239; Cent. Dig. §§ 583–600.*

[93] Babcock v. Lawson, 4 Q. B. Div. 394; ROWLEY v. BIGELOW, 12 Pick. (Mass.) 307, 23 Am. Dec. 607, Throckmorton Cas. Contracts, 196; Hoffman v. Noble, 6 Metc. (Mass.) 68, 39 Am. Dec. 711; Neff v. Landis, 110 Pa. 204, 1 Atl. 177; Le Grand v. Bank, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; Moore v. Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170; Jones v. Christian, 86 Va. 1017, 11 S. E. 984; Armstrong v. Lewis, 38 Ill. App. 164; First Nat. Bank v. Carriage Co., 70 Miss. 587, 12 South. 598; Scheuer v. Goetter, 102 Ala. 313, 14 South. 774; Hall v. Hinks, 21 Md. 406; Singer Mfg. Co. v. Sammons, 49 Wis. 316, 5 N. W. 788; Cochran v. Stewart, 21 Minn. 435. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 239; Cent. Dig. §§ 583–600.*

[94] Buffington v. Gerrish, 15 Mass. 158, 8 Am. Dec. 97; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Jordan v. Parker, 56 Me. 557; Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; Henderson v. Gibbs, 39 Kan. 679, 684, 18 Pac. 926. *See "Sales," Dec. Dig. (Key-No.) § 222; Cent. Dig. §§ 609–611; "Vendor and Purchaser," Dec. Dig. (Key-No.) § 216; Cent. Dig. § 441; "Execution," Cent. Dig. §§ 53, 106–109, 113, 115.*

[95] Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Bussing v. Rice, 2 Cush. (Mass.) 48; Singer v. Schilling, 74 Wis. 369, 43 N. W. 101; Benesch v. Weil, 69 Md. 274, 14 Atl. 666. *See "Sales," Dec. Dig. (Key-No.) § 230; Cent. Dig. § 650.*

[96] Barnard v. Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Stevens v. Brennan, 79 N. Y. 258; Sleeper v. Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; Poor v. Woodburn, 25 Vt. 235; McGraw v. Solomon, 83 Mich. 442, 47 N. W. 345. Contra, Shufeldt v. Pease, 16 Wis. 659; Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401. *See "Sales," Dec. Dig. (Key-No.) § 230; Cent. Dig. § 650.*

[97] CUNDY v. LINDSAY, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406, Throckmorton Cas. Contracts, 169; Loeffel v. Pohlman, 47 Mo. App. 574. Cf. Edmunds v. Transportation Co., 135 Mass. 283. *See "Sales," Dec. Dig. (Key-No.) § 234; Cent. Dig. §§ 645–680.*

[98] Cases cited, ante, p. 250, note 21.

poses he is selling, the person thus obtaining the goods acquires no title, and a bona fide purchaser from him stands in no better position. In such case there is no contract at all, as the seller never consented to sell to the person to whom he delivered the goods.

As a rule, if a negotiable instrument is procured by fraud, the party intending to sign it as such, so that there is no mistake as to the character of the instrument, it cannot be avoided on the ground of the fraud after it has passed into the hands of a bona fide purchaser for value;[99] but, as we have seen, it is otherwise where, by fraud or circumvention, a person is induced to sign a negotiable instrument, when he does not intend to sign it, but thinks he is signing something else, provided, of course, he is not guilty of such negligence as will estop him from setting up his mistake.[1]

DURESS

142. Duress is actual or threatened violence or imprisonment, by reason of which a person is forced to enter into a contract. To affect the contract, however,

(a) It must have been against or of the contracting party, or his or her wife, or husband, parent, child, or other near relative.

(b) It must have been inflicted or threatened by the other party to the contract, or by one acting with his knowledge or on his behalf.

(c) It must have induced the party to enter into the contract.

143. OF GOODS. By the weight of modern authority, the unlawful detention of another's goods under oppressive circumstances, or their threatened destruction, may constitute duress.

144. EFFECT. A contract entered into by a person under duress is voidable at his option.

The ground upon which a contract entered into under duress can be avoided is because there is no real consent. The apparent consent is unreal because of the imprisonment or force, or of the fear

[99] Clark v. Thayer, 105 Mass. 216, 7 Am. Rep. 511; Smith v. Livingston, 111 Mass. 342; Southwick v. Bank, 84 N. Y. 420; Gridley v. Bane, 57 Ill. 529; Ormsbee v. Howe, 54 Vt. 182, 41 Am. Rep. 841. *See "Bills and Notes," Dec. Dig. (Key-No.) § 373; Cent. Dig. §§ 966–970.*

[1] See ante, p. 247.

caused by the threats. "Actual violence," it has been said, "is not necessary to constitute duress, * * * because consent is the very essence of a contract; and, if there be compulsion, there is no actual consent; and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. 'Duress,' in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness." [2]

The statement of what constitutes duress, made in this and many other cases,[3] requires that the violence or threats shall have been sufficient to overcome a mind of "ordinary firmness," or the mind of a person of "ordinary courage." By the great weight of modern authority, however, both in this country and in England, this test has been rejected. The rule now generally prevailing is that violence or threats employed for the purpose of overcoming the mind, and actually having that effect, constitute duress, although the violence or threats employed would not be sufficient to overcome the mind of a person of ordinary firmness.[4]

[2] Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134. See, also, Baker v. Morton, 12 Wall. 150, 20 L. Ed. 262; Foshay v. Ferguson, 5 Hill (N. Y.) 154; Eadie v. Slimmon, 26 N. Y. 12, 82 Am. Dec. 393; French v. Shoemaker, 14 Wall. 314, 20 L. Ed. 852; U. S. v. Huckabee, 16 Wall. 432, 21 L. Ed. 457; Miller v. Miller, 68 Pa. 486; Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556; Fisher v. Shattuck, 17 Pick. (Mass.) 252; Gotwalt v. Neal, 25 Md. 434; Bane v. Detrick, 52 Ill. 19; Alexander v. Pierce, 10 N. H. 494; McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321; Batavian Bank v. North, 114 Wis. 637, 90 N. W. 1016. A threat by a husband to separate from his wife and not support her has been held such duress as to avoid a deed by her to him induced thereby. Tapley v. Tapley, 10 Minn. 448 (Gil. 360), 88 Am. Dec. 76. An angry command by husband to wife, unaccompanied by threats of personal violence, held not duress. Gabbey v. Forgeus, 38 Kan. 62, 15 Pac. 866. Merely to speak roughly to a woman, without threats of personal violence, is not duress. Dausch v. Crane, 109 Mo. 323, 19 S. W. 61. Mere vexation and annoyance is not duress. Brower v. Callender, 105 Ill. 88. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[3] United States v. Huckabee, 16 Wall. 414, 21 L. Ed. 457; Hines v. Board, 93 Ind. 266; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Flanigan v. City of Minneapolis, 36 Minn. 406, 31 N. W. 359; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321; Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[4] GALUSHA v. SHERMAN, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417,

It is almost needless to add that the contract must have been made because of the imprisonment, or of fear of the threatened injury or imprisonment; otherwise, there is no duress.[5]

Duress per Minas

Duress per minas, as defined at common law, is where a person is forced to enter into a contract (a) from fear of loss of life; (b) from fear of loss of limb; (c) from fear of mayhem; (d) from fear of imprisonment,—and there is no doubt but that threats of such injuries will constitute duress.[6] The older English authorities restrict the operation of the rule within the limits mentioned. They deny that contracts procured by menace of a mere battery to the person can be avoided on that ground; and the reason assigned for this rule is that such threats are not of a nature to overcome the mind and will of a firm and prudent man.[7] There are cases to the same effect in this country, and some of the text writers have adopted the old rule.[8]

Throckmorton Cas. Contracts, 200; Cribbs v. Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; Baldwin v. Hutchinson, 8 Ind. App. 454, 35 N. E. 711; Parmentier v. Pater, 13 Or. 121, 9 Pac. 59; International Harvester Co. v. Voboril, 187 Fed. 973, 110 C. C. A. 311; McCarthy v. Tanska, 84 Conn. 377, 80 Atl. 84; Williamson-Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; Brown v. Worthington, 162 Mo. App. 508, 142 S. W. 1082; Nebraska Mut. Bond Ass'n v. Klee, 70 Neb. 383, 97 N. W. 476. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[5] Feller v. Green, 26 Mich. 70; Flanigan v. City of Minneapolis, 36 Minn. 406, 31 N. W. 359; Schwartz v. Schwartz, 29 Ill. App. 516; Inhabitants of Whitefield v. Longfellow, 13 Me. 146; Alexander v. Pierce, 10 N. H. 494; Bosley v. Shanner, 26 Ark. 280; Stone v. Weiller, 57 Hun, 588, 10 N. Y. Supp. 828; Post v. Bank, 138 Ill. 559, 28 N. E. 978. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[6] 3 Bac. Abr. "Duress," 252; Baker v. Morton, 12 Wall. 150, 20 L. Ed. 262; and cases hereafter cited. Threat of personal violence. Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Baker v. Morton, supra; Magoon v. Reber, 76 Wis. 392, 45 N. W. 112; Anderson v. Anderson, 74 Hun, 56, 26 N. Y. Supp. 492. Threat of criminal prosecution and imprisonment. Foshay v. Ferguson, 5 Hill (N. Y.) 154; 2 Co. Inst. 483; Co. Litt. 253b; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Inhabitants of Whitefield v. Longfellow, 13 Me. 146; Bane v. Detrick, 52 Ill. 19; James v. Roberts, 18 Ohio, 548; Baldwin v. Hutchison, 8 Ind. App. 454, 35 N. E. 711; Maricle v. Brooks, 51 Hun, 638, 5 N. Y. Supp. 210; Morrison v. Faulkner, 80 Tex. 128, 15 S. W. 797; Landa v. Obert, 78 Tex. 33, 14 S. W. 297; Winfield Nat. Bank v. Croco, 46 Kan. 620, 26 Pac. 939. See post, p. 301, and cases cited. A threat to "make complaint" and send the person threatened to prison is not duress, where the threats do not specify an offense for which imprisonment may be had. Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[7] 2 Co. Inst. 483; Shep. Touch. 6; post, p. 300. [8] 1 Pars. Cont. 393.

By the modern rule, however, threats and fear of battery to the person are sufficient to constitute duress, if the mind of the party is actually overcome thereby.[9]

It is not necessary that the threats be made directly to the person to be influenced; it is sufficient if they are made to a third person with intent that they be communicated to him, and they are actually communicated.[10]

Duress of Imprisonment

Imprisonment is any restraint of a person's liberty, whether it be in prison or elsewhere. Any unlawful imprisonment, whatever may be the ground of illegality, constitutes duress, and avoids a contract entered into by the person imprisoned for the purpose of regaining his liberty.[11] Under the older rule, the imprisonment must have been illegal; lawful imprisonment, whatever might be the circumstances, was not regarded as duress;[12] and this rule has been adhered to in some of the modern cases.[13] By the overwhelming weight of modern authority, however, the rule has been so far modified that now even a legal imprisonment will constitute duress if the process is sued out maliciously and without probable cause, or if it is sued out with probable cause, but for an unlawful purpose; as, for instance, where a legal arrest for crime is procured for the purpose of coercing payment of a private demand, or if the imprisonment, though legal, is made unjustly oppressive.[14] All the courts agree, however, that if the imprison-

[9] Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Foshay v. Ferguson, 5 Hill (N. Y.) 154; Love v. State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[10] Price v. Bank of Poynette, 144 Wis. 190, 128 N. W. 895. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[11] Osborn v. Robbins, 36 N. Y. 365; Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Stepney v. Lloyd, Cro. Eliz. 647, Ewell, Lead. Cas. 760; Fisher v. Shattuck, 17 Pick. (Mass.) 252; Alexander v. Pierce, 10 N. H. 494; Whitefield v. Longfellow, 13 Me. 146; Thompson v. Lockwood, 15 Johns. (N. Y.) 256; Bowker v. Lowell, 49 Me. 429; Tilley v. Damon, 11 Cush. (Mass.) 247. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[12] 2 Co. Inst. 483; Shep. Touch. 6.

[13] Clark v. Turnbull, 47 N. J. Law, 265, 54 Am. Rep. 157; Kelsey v. Hobby, 16 Pet. 269, 10 L. Ed. 961; Taylor v. Cottrell, 16 Ill. 93; Heaps v. Dunham, 95 Ill. 583; McCormick Harvester Co. v. Miller, 54 Neb. 644, 74 N. W. 1061. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[14] Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Richardson v. Duncan, 3 N. H. 508; Seiber v. Price, 26 Mich. 518; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741; Bane v. Detrick, 52 Ill. 19; Work's Appeal, 59 Pa. 444; Phelps v. Zuschlag, 34 Tex. 871; Holmes v. Hill, 19 Mo. 159; Foley v. Greene, 14 R. I. 618, 51 Am. Rep.

ment is lawful, and there is no abuse of process, there is no duress.[15]

The rule that the imprisonment must be unlawful applies equally to duress per minas, where the threat is of imprisonment. A threat of unlawful arrest and imprisonment is duress,[16] but, as a rule, a threat of lawful imprisonment is not.[17] A threat, for instance, by a creditor, to bring a suit against his debtor, and procure his arrest therein, is not duress where the creditor may lawfully so proceed.[18] It has also been said, without qualification, that, if a person has been wronged by the embezzlement or other criminal act of another, it is not duress to threaten him with a criminal prosecution, and thereby coerce him into giving a note, or otherwise settling for the injury.[19] As we have seen, however, a strictly legal imprisonment procured for the purpose of enforcing a private demand is an abuse of process, and constitutes duress; and on the same principle it has been held duress to threaten imprisonment for such a purpose.[20]

419; Town of Sharon v. Gager, 46 Conn. 189; Bentley v. Robson, 117 Mich. 691, 76 N. W. 146; Behl v. Schuett, 104 Wis. 76, 80 N. W. 73. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[15] Soule v. Bouney, 87 Me. 128; Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798; Felton v. Gregory, 130 Mass. 176; Taylor v. Cottrell, 16 Ill. 93; Nealey v. Greenough, 25 N. H. 325; Smith v. Atwood, 14 Ga. 402; Stouffer v. Latshaw, 2 Watts (Pa.) 165, 27 Am. Dec. 297; State v. Such, 53 N. J. Law, 351, 21 Atl. 852; Meek v. Atkinson, 1 Bailey (S. C.) 84, 19 Am. Dec. 653; Stebbins v. Niles, 25 Miss. 267, 349; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191; Harrison Tp. v. Addison, 176 Ind. 389, 96 N. E. 146. And see Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[16] GALUSHA v. SHERMAN, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, Throckmorton Cas. Contracts, 200. And see ante, p. 299. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[17] Mullin v. Leamy, 80 N. J. Law, 484, 79 Atl. 257. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[18] Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76; Clark v. Turnbull, 47 N. J. Law, 265, 54 Am. Rep. 157; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[19] Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; Taylor v. Cottrell, 16 Ill. 93; Sanford v. Sornborger, 26 Neb. 295, 41 N. W. 1102; Thorn v. Pinkham, 84 Me. 103, 24 Atl. 718, 30 Am. St. Rep. 335; Weber v. Barrett, 125 N. Y. 18, 25 N. E. 1068; Compton v. Bank, 96 Ill. 301, 36 Am. Rep. 147. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[20] See Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 523; Adams v. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; Miller v. Bryden, 84 Mo. App. 602; Morrison v. Faulkner, 80 Tex. 128, 15 S. W. 797; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Morrill v. Night-

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Duress of Goods

Under the stricter rule which formerly prevailed, a promise was not given under duress if made in consideration of the release of goods from unlawful destruction or detention, and there is modern authority to the same effect.[21] Most courts, however, have established a more liberal rule, and regard duress of goods under oppressive circumstances as sufficient to avoid a contract.[22] Duress in this connection must not be confounded with want of consideration. If the detention were obviously without right, the promise would be void because of want of consideration; if the right were doubtful, the promise might be supported by a com-

ingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; Bryant v. Peck, 154 Mass. 460, 28 N. E. 678; Lighthall v. Moore, 2 Colo. App. 554, 31 Pac. 511; Heaton v. Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876. *See "Contracts," Dec. Dig. (Key-Nos) § 95; Cent. Dig. §§ 431–440.*

[21] Atlee v. Backhouse, 3 Mees. & W. 633; Skeate v. Beale, 11 Adol. & E. 983; Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[22] Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569; U. S. v. Huckabee, 16 Wall. 432, 21 L. Ed. 457; Foshay v. Ferguson, 5 Hill (N. Y.) 154; Sasportas v. Jennings, 1 Bay (S. C.) 470; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; White v. Heylman, 34 Pa. 142; Motz v. Mitchell, 91 Pa. 114; Miller v. Miller, 68 Pa. 486; Pemberton v. Williams, 87 Ill. 15; Scholey v. Mumford, 60 N. Y. 498; McPherson v. Cox, 86 N. Y. 472; Crawford v. Cato, 22 Ga. 594; Bennett v. Ford, 47 Ind. 264; Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; McCormick v. Dalton, 53 Kan. 146, 35 Pac. 1113; Fuller v. Roberts, 35 Fla. 110, 17 South. 359. A note given, or money paid, to obtain release of goods from attachment fraudulently obtained, may, under some circumstances, be avoided or recovered back. Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Collins v. Westbury, 2 Bay (S. C.) 211, 1 Am. Dec. 643; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Nelson v. Suddarth, 1 Hen. & M. (Va.) 350. But seizure of property claimed by A. under attachment against B. is not duress of A. Kingsbury v. Sargent, 83 Me. 230, 22 Atl. 105. So, where a note is given, or money paid, to prevent seizure of property under execution fraudulently obtained, Thurman v. Burt, 53 Ill. 129; or under warrant for the collection of illegal tax or assessment, Boston & S. Glass Co. v. City of Boston, 4 Metc. (Mass.) 181; Bruecher v. Village of Port Chester, 101 N. Y. 240, 4 N. E. 272; Bradford v. City of Chicago, 23 Ill. 411. Exactions by carrier before delivery of property. Beckwith v. Frisbie, 32 Vt. 559; Tutt v. Ide, 3 Blatchf. 249, Fed. Cas. No. 14,275b; Harmony v. Bingham, supra. Refusal by carrier to transport freight. Little Rock & Ft. S. Ry. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230. Refusal by carrier to carry stock which has been loaded on cars, unless shipper will sign special contract. Atchison R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148. Refusal by banker to honor check unless fraudulent claim is acceded to, held duress. Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202. Threat to file mechanic's lien. Gates v. Dundon (City Ct. N. Y.) 18 N. Y. Supp. 149. Exactions by customs officer as condition to delivery of property. Maxwell v.

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promise. A mere refusal to pay money unless the creditor signs a receipt in full is not duress;[22] nor is the refusal of a debtor to pay a debt, even where the creditor is in straitened circumstances and needs the money.[24] So a threat to institute a civil action,[25] or to levy an attachment or execution,[26] is not duress.

Against Whom

As a rule a contract entered into in order to relieve a third person is not voidable on the ground of duress.[27] It should be noted, however, that a simple contract, the consideration for which is the discharge of a third person from illegal imprisonment, would be void for want of consideration.[28] Though the law does not

Griswold, 10 How. 242, 13 L. Ed. 405; Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373. Threats to prevent clearance of vessel, with power to carry out, is duress of ship's master. Baldwin v. Timber Co., 65 Hun, 625, 20 N. Y. Supp. 496. And see McPherson v. Cox, supra. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[22] Earle v. Berry, 27 R. I. 221, 61 Atl. 671, 1 L. R. A. (N. S.) 867, 8 Ann. Cas. 875. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[24] Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Secor v. Clark, 117 N. Y. 350, 22 N. E. 754; Cable v. Foley, 45 Minn. 421, 47 N. W. 1135; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Doyle v. Church, 133 N. Y. 372, 31 N. E. 221. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[25] McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Whittaker v. Improvement Co., 34 W. Va. 217, 12 S. E. 507; Wilson S. M. Co. v. Curry, 126 Ind. 161, 25 N. E. 896; Atkinson v. Allen, 71 Fed. 58, 17 C. C. A. 570; York v. Hinkle, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73; Bestor v. Hickie, 71 Conn. 181, 41 Atl. 535; Hart v. Strong, 183 Ill. 349, 55 N. E. 629. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[26] Wilcox v. Howland, 23 Pick. (Mass.) 167; Waller v. Cralle, 8 B. Mon. (Ky.) 11; Stover v. Mitchell, 45 Ill. 213. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[27] Robinson v. Gould, 11 Cush. (Mass.) 55; Plummer v. People, 16 Ill. 358; Phillips v. Henry, 160 Pa. 24, 28 Atl. 477, 40 Am. St. Rep. 706; Jones v. Turner, 5 Litt. (Ky.) 147; Wright v. Remington, 41 N. J. Law, 48, 32 Am. Rep. 180; Spaulding v. Crawford, 27 Tex. 155; Lewis v. Bannister, 16 Gray (Mass.) 500 (creditors). A surety cannot avoid a common-law bond or note on the ground that his principal was under duress. Huscombe v. Standing, Cro. Jac. 187; Graham v. Marks, 98 Ga. 67, 25 S. E. 931. Contra, Strong v. Grannis, 26 Barb. (N. Y.) 122. But it is otherwise in the case of statutory bonds, such as a bond given under a statute to release the principal from imprisonment, where the imprisonment is illegal. In such case the officer has no right to take the bond, and it is void. Thompson v. Lockwood, 15 Johns. (N. Y.) 256. And see State v. Brantley, 27 Ala. 44; Patterson v. Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 856; Fisher v. Shattuck, 17 Pick. (Mass.) 252; Jones v. Turner, 5 Litt. (Ky.) 147. But see Plummer v. People, 16 Ill. 358; Huggins v. People, 89 Ill. 246; Inhabitants of Bordentown Tp. v. Wallace, 50 N. J. Law, 13, 11 Atl. 267. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[28] Ante, p. 153.

regard a person as under duress who enters into a contract to relieve a stranger, it is otherwise where the person relieved is a near relative, as a husband, wife, parent, or child.[29] These are the only relationships generally mentioned in the books, but the rule has been extended to other relationships, as of brother, sister, grandparent, or grandchild.[30]

By Whom

The duress, to be available as a defense, must have been inflicted or threatened by the other party to the contract, or by some one acting with his connivance.[31] A person entering into a contract with another under duress exercised by a third person may avoid the contract if the third person was the other party's agent, or if the other party knew the circumstances,[32] but not if he acted in good faith and without such knowledge.

Effect

A contract is not void because it was entered into under duress, but, as in the case of fraud, is merely voidable at the option of the injured party,[33] and stands unless he sees fit to avoid or rescind

[29] Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Plummer v. People, 16 Ill. 360; First Nat. Bank v. Bryan, 62 Iowa, 42, 17 N. W. 165; Lomerson v. Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Brooks v. Berryhill, 20 Ind. 97; Southern Exp. Co. v. Duffey, 48 Ga. 361; Adams v. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; McClatchie v. Haslam, 63 Law T. 376; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Bryant v. Peck, 154 Mass. 460, 28 N. E. 678; City Nat. Bank v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; Giddings v. Iowa Sav. Bank, 104 Iowa, 676, 74 N. W. 21; Heaton v. Norman Co.'s Bank, 59 Kan. 281, 52 Pac. 876; Davis v. Smith, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584; International Harvester Co. v. Voboril, 187 Fed. 973, 110 C. C. A. 311. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[30] Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Bradley v. Irish, 42 Ill. App. 85; Nebraska Mut. Bond Ass'n v. Klee, 70 Neb. 383, 97 N. W. 476. It seems that it does not extend to master and servant. 1 Rolle, Abr. 687; Bac. Abr. "Duress," B; 2 Brownl. 276. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[31] 1 Rolle, Abr. 688; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Fightmaster v. Levi (Ky.) 17 S. W. 195; Sherman v. Sherman (Com. Pl. N. Y.) 20 N. Y. Supp. 414; Compton v. Bank, 96 Ill. 301, 36 Am. Rep. 147; Schwartz v. Schwartz, 29 Ill. App. 516; Mullin v. Leamy, 80 N. J. Law, 484, 79 Atl. 257; Ely v. Hartford Life Ins. Co., 128 Ky. 799, 110 S. W. 265, 33 Ky. Law Rep. 272. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[32] GALUSHA v. SHERMAN, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, Throckmorton Cas. Contracts, 200; Fairbanks v. Snow, supra; McClatchie v Haslam, 63 Law T. 376. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[33] Royal v. Goss, 154 Ala. 117, 45 South. 231, in which, however, it is sug-

it. He may either ratify or disaffirm it, and may do so by his conduct.[84] The rules as to the right to rescind a contract for fraud apply with equal force here, and it is unnecessary to repeat them.

UNDUE INFLUENCE

145. Undue influence is a species of fraud. It may be said generally to consist—

(a) In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

(b) In taking an unfair advantage of another's weakness of mind.

(c) In taking a grossly oppressive and unfair advantage of another's necessities and distress.

146. EFFECT. Undue influence renders a contract voidable at the option of the injured party.

Courts of equity have always given a wider interpretation to the term "fraud" than that adopted by the courts of common law. Looking beyond definite false and fraudulent statements, they have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not, in equity, to bind him. The taking of such an unfair advantage is sometimes called "fraud," but it is more convenient, for the purpose of distinguishing it from the kind of fraud with which we have already dealt, to call it the "exercise of undue influence." [85] It is difficult to give a clear and

gested that the contract will be void if the duress is so severe that the person on whom it is imposed is converted into a mere automaton. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[84] Miller v. Minor, 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Oregon Pac. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137; Veach v. Thompson, 15 Iowa, 380; Belote v. Henderson, 5 Cold. (Tenn.) 472, 98 Am. Dec. 432; Brown v. Peck, 2 Wis. 261; Deputy v. Stapleford, 19 Cal. 302; Eberstein v. Willets, 134 Ill. 101, 24 N. E. 967; Bush v. Brown, 49 Ind. 577, 19 Am. Rep. 695; Sornborger v. Sanford, 34 Neb. 498, 52 N. W. 368; Commercial Nat. Bank v. Wheelock, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738. Ante, p. 291. A negotiable instrument executed under duress is binding in hands of bona fide purchaser for value. Hogan v. Moore, 48 Ga. 156; Clark v. Pease, 41 N. H. 414; Thompson v. Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[85] Anson, Cont. (4th Ed.) 165.

concise definition of "undue influence" because of the wide meaning of the term. The definition given in the black-letter text, and taken substantially from the proposed New York Code, is probably as good as can be framed without going beyond a mere definition.[36] Another good definition is given by an English judge, who, in speaking of the sort of cases "which * * * raise, from the circumstances and conditions of the parties contracting, a presumption of fraud," says: "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and, when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable." [37]

Neither in law nor in morals is a person standing in confidential relations to another prohibited from exerting any influence whatever to obtain a benefit to himself. The influence must be what the law regards as "undue influence." [38] "Influence obtained by modest persuasion, and arguments addressed to the understanding, or by mere appeals to the affections, cannot properly be termed 'undue influence' in a legal sense; [39] but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will" of a person "to such an extent as to destroy the free agency,[40] or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue." [41]

[36] Proposed N. Y. Civ. Code, § 231.

[37] Lord Selbourne, in Earl of Aylesford v. Morris, 8 Ch. 490. See, also, Green v. Roworth, 113 N. Y. 462, 21 N. E. 165; In re Nelson's Will, 39 Minn. 204, 39 N. W. 143. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1155, 1169.*

[38] Wallace v. Harris, 32 Mich. 397. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1155, 1169; "Deeds," Dec. Dig. (Key-No.) § 72; Cent. Dig. §§ 190–199.*

[39] Rogers v. Higgins, 57 Ill. 244; Wise v. Foote, 81 Ky. 10; Hale v. Cole, 31 W. Va. 576, 8 S. E. 516; Beith v. Beith, 76 Iowa, 601, 41 N. W. 371; Black v. Foljambre, 39 N. J. Eq. 234; Sturtevant v. Sturtevant, 116 Ill. 340, 6 N. E. 428; Bowdoin College v. Merrett (C. C.) 75 Fed. 480; In re Coleman's Estate, 193 Pa. 605, 44 Atl. 1085; Du Bose v. Kell, 90 S. C. 196, 71 S. E. 371 (full statement of rules); Fjone v. Fjone, 16 N. D. 100, 112 N. W. 70. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1155, 1169.*

[40] Latham v. Udell, 38 Mich. 238; Layman v. Conrey, 60 Md. 286. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1155, 1169.*

[41] Schofield v. Walker (In re Disbrow's Estate) 58 Mich. 96, 24 N. W. 624.

The Presumption from Circumstances

When it is said that equity presumes prima facie the exercise of undue influence from the circumstances, we mean that, when certain circumstances are shown to have existed, the court will, from that alone, hold that the contract was procured by undue influence, and will relieve the promisor unless the promisee assumes the burden of proof, and shows that everything was fair and just.[42] In some cases the relation alone, being confidential, raises the presumption. In others, the confidential character of the relation must be shown. In others, want or inadequacy of consideration will raise the presumption.[43]

"We may therefore frame the question we have to discuss somewhat in this way: When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape the effects of a grant which he has made gratuitously, or a promise which he has given upon a very inadequate consideration, what must be shown in addition to this in order to raise the presumption that undue influence has been at work?" [44]

Relationship of Parties—Parental and Quasi Parental Relation

One class of circumstances which will raise the presumption that undue influence was used in procuring another to enter into a contract is where the party benefited stood in some such relation to him as to render him peculiarly subject to influence. Parental or quasi parental relations subsisting between promisor and promisee, or grantor and grantee, will raise this presumption.[45] Where an or-

See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1155, 1169; "Wills," Dec. Dig. (Key-No.) §§ 155–159; Cent. Dig. §§ 375–387.

[42] McPARLAND v. LARKIN, 155 Ill. 84, 39 N. E. 609, Throckmorton Cas. Contracts, 212; Dent. v. Bennett, 4 Mylne & C. 269; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428, at page 99; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275, 55 m. Rep. 479; Greenfield's Estate, 14 Pa. 489; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Sands v. Sands, 112 Ill. 225; Ward v. Armstrong, 84 Ill. 151; Zeigler v. Hughes, 55 Ill. 288; Jennings v. McConnel, 17 Ill. 148; Casey v. Casey, 14 Ill. 112. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[43] Ante, p. 144. The acceptance of a voluntary donation throws upon the acceptor the necessity of proving that the transaction was just. Houghton v. Houghton, 15 Beav. 299. *See "Gifts," Dec. Dig. (Key-No.) § 47; Cent. Dig. §§ 81–86; "Parent and Child," Cent. Dig. § 131.*

[44] Anson, Cont. (4th Ed.) 166.

[45] Taylor v. Taylor, 8 How. 183, 12 L. Ed. 1040; Miskey's Appeal, 107 Pa. 611; Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593; Berkmeyer v. Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577; Brown v. Burbank, 64 Cal. 99, 27 Pac. 940; Clutter v. Clutter, 4 S. W. 182, 8 Ky. Law Rep. 956; Sayles v. Christie, 187

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phan who had been living with her uncle for seven years became security for him soon after attaining her majority, it was said by the court, adverting to the fact that the security was obtained, through the influence of one standing in loco parentis, from the object of his protection and care: "This is a transaction which, under ordinary circumstances, this court will not allow. * * * This court does not interfere to prevent an act, even of bounty, between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control." [46]

Same—Other Family Relations

The term "parental relations" applies, not only to the actual relation of parent and child, and of one in loco parentis and child, but extends to husband and wife, brother and brother or sister, and to all cases in which one member of a family, from age, character, or circumstances, exercises a substantial preponderance of authority in the family councils.[47]

Same—Fiduciary Relations

Persons standing in a fiduciary relation occupy a relation of confidence, and are within this equitable rule. A contract between a trustee and his cestui que trust,[48] or between a guardian and his

Ill. 420, 58 N. E. 480. But see Jenkins v. Pye, 12 Pet. 241, 9 L. Ed. 1070. *See "Parent and Child," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 74, 111–135.*

[46] Archer v. Hudson, 7 Beav. 560. *See "Parent and Child," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 74, 111–135.*

[47] Green v. Roworth, 113 N. Y. 462, 21 N. E. 165; Harvey v. Mount, 8 Beav. 439; Graham v. Burch, 44 Minn. 33, 46 N. W. 148; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Watkins v. Brant, 46 Wis. 419, 1 N. W. 82; Bowe v. Bowe, 42 Mich. 195, 3 N. W. 843; Golding v. Golding, 82 Ky. 51; Swisshelm's Appeal, 56 Pa. 475, 94 Am. Dec. 107; Hill v. Miller, 50 Kan. 659, 32 Pac. 354; Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Brown v. Burbank, 64 Cal. 99, 27 Pac. 940; Greene v. Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724; Woods v. Roberts, 185 Ill. 489, 57 N. E. 426; Bowen v. Kutzner 167 Fed. 281, 93 C. C. A. 33 (brother and sister); Ziegler v. Shuler, 87 S. C. 1, 68 S. E. 817. No presumption of fiduciary relation arises from mere proof that the parties are brothers, but may be shown by evidence that confidence was actually reposed and abused. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169; "Wills," Dec. Dig. (Key-No.) § 157; Cent. Dig. §§ 383, 384.*

[48] Spencer's Appeal, 80 Pa. 317; Ward v. Armstrong, 84 Ill. 151; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; McCants v. Bee, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610. Principal and agent. Burke v. Taylor, 94 Ala. 530, 10 South. 129. *See "Guardian and Ward," Dec. Dig. (Key-No.) § 69; Cent. Dig. §§ 261, 305–307; "Trusts," Dec. Dig. (Key-No.) § 283; Cent. Dig. §§ 403, 404.*

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ward,[49] is looked upon with suspicion. It is presumed that the trustee or guardian who is benefited by the promise of his cestui que trust or ward has used his peculiar position of confidence to his own advantage, and, in order that the contract may stand, he must show the contrary.

Same—Other Confidential Relations

The power which a spiritual adviser may acquire over persons subject to his influence is also looked upon as raising the presumption of undue influence;[50] and to this may be added a number of other relations, such as attorney or solicitor and client,[51] and doctor and patient.[52] The relations mentioned are not all.[53] The courts have not limited or defined the relations which they will regard as raising this presumption of influence. The principle, it is said, applies to every case where "influence is acquired and abused, where confidence is reposed and betrayed."[54] Thus, where a young man

[49] McPARLAND v. LARKIN, 155 Ill. 84, 39 N. E. 609, Throckmorton Cas. Contracts, 212; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Wickiser v. Cook, 85 Ill. 68; Wade v. Pulsifer, 54 Vt. 45; Bowe v. Bowe, 42 Mich. 195, 3 N. W. 843; Garvin's Adm'r v. Williams, 44 Mo. 465, 100 Am. Dec. 314; Id., 50 Mo. 206. *See "Guardian and Ward," Dec. Dig. (Key-No.) § 69; Cent. Dig. §§ 261, 305–307.*

[50] Huguennin v. Baseley, 14 Ves. 273; Marx v. McGlynn, 88 N. Y. 357; Corrigan v. Pironi, 48 N. J. Eq. 607, 23 Atl. 355; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Finegan v. Theisen, 92 Mich. 173, 52 N. W. 619; Ford v. Hennessy, 70 Mo. 580. Spirit medium's influence over believer in spiritualism. Thompson v. Hawks (C. C.) 14 Fed. 902; Connor v. Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169; "Wills," Dec. Dig. (Key-No.) § 157; Cent. Dig. §§ 383, 384.*

[51] St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Carter v. West, 93 Ky. 211, 19 S. W. 592; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Jennings v. McConnel, 17 Ill. 148; Zeigler v. Hughes, 55 Ill. 288; Ryan v. Ashton, 42 Iowa, 365. *See "Attorney and Client," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 239–249.*

[52] Audenreid's Appeal, 89 Pa. 114, 33 Am. Rep. 731; Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Dent v. Bennett, 4 Mylne & C. 269; Blackie v. Clark, 15 Beav. 603; Cadwallader v. West, 48 Mo. 483; Watson v. Mahan, 20 Ind. 227; Viallet v. Consolidated Ry. & Power Co., 30 Utah, 260. 84 Pac. 496, 5 L. R. A. (N. S.) 613. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169; "Wills," Dec. Dig. (Key-No.) § 157; Cent. Dig. §§ 383, 384.*

[53] Dent v. Bennett, 4 Mylne & C. 269; Drake's Appeal, 45 Conn. 9; Boyd v. De La Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Darlington's Appeal, 86 Pa. 512, 27 Am. Rep. 726; Rockafellow v. Newcomb, 57 Ill. 186; Cadwallader v. West, 48 Mo. 483; Caspari v. Church, 82 Mo. 649; Allcord v. Skinner, 36 Ch. Div. 145; Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712; Russell v. Russell, 60 N. J. Eq. 282, 47 Atl. 37. As to master and servant, Doran v. McConlogue, 150 Pa. 98, 24 Atl. 357. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[54] Sears v. Shafer, 6 N. Y. 268; Fisher v. Bishop, 108 N. Y. 25, 15 N. E.

who had just attained his majority incurred heavy liabilities to a person by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation, it was held that influence of this nature entitled the young man to the protection of the court. "The principle," it was said, "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of chancery most ordinarily deals are those of trustee and cestui que trust, and such like. It applies especially to those cases, for this reason, and for this reason only: that from those relations the court presumes confidence put and influence exerted, whereas, in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically. But, where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a court of equity, are just as applicable in the one case as the other." [55]

Same—Continuance of Presumption

The presumption of undue influence from the parental or quasi parental relation does not cease as soon as the child becomes of age and is emancipated in law. His judgment must also be emancipated. The confidential relation and consequent presumption of undue influence continues until the child is entirely released from any sort of control; [56] and the same principle applies to the relation of guardian and ward and the other confidential relations.[57]

331, 2 Am. St. Rep. 857; Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; Leighton v. Orr, 44 Iowa, 679; Haydock v. Haydock's Ex'rs, 34 N. J. Eq. 570, 38 Am. Rep. 385; McCormick v. Malin, 5 Blackf. (Ind.) 509; Todd v. Grove, 33 Md. 188; Cherbonnier v. Evitts, 56 Md. 276; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; McClure v. Lewis, 72 Mo. 314; Williams v. Collins, 67 Iowa, 413, 25 N. W. 682; Hanna v. Wilcox, 53 Iowa, 547, 5 N. W. 717; Reed v. Peterson, 91 Ill. 288; Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568; Courtney v. Blackwell, 150 Mo. 245, 51 S. W. 668. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[55] Smith v. Kay, 7 H. L. Cas. 750, 779. See, also, Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[56] Archer v. Hudson, 7 Beav. 560; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; Miller v. Simonds, 72 Mo. 669; White v. Ross, 160 Ill. 56, 43 N. E. 336. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169; "Parent and Child," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 74, 111–135.*

[57] McPARLAND v. LARKIN, 155 Ill. 84, 39 N. E. 609, Throckmorton Cas. Contracts, 212; Rhodes v. Bates, L. R. 1 Ch. 252; Mitchell v. Homfray, 8 Q. B. Div. 587. *See "Guardian and Ward," Dec. Dig. (Key-No.) § 69; Cent. Dig. §§ 261, 305–307.*

Same—Rebuttal of Presumption

Where a presumption of undue influence exists by reason of the relations of the parties, it has been said that to render the transaction valid it is only necessary to show that the other party had competent and disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise." [58]

Mental Weakness

Mere weakness of intellect, not so great as to render the person non compos mentis, will not of itself affect the validity of a contract.[59] If, however, the other party has taken advantage of such weakness, and by the use of fraud and undue influence has made an unfair contract, it will be set aside.[60]

Personal Influence Absent—Advantage Taken of Another's Necessities and Distress

The doctrine of undue influence has been extended to a class of cases from which the element of personal influence is altogether absent. They all appear to possess these common features, namely, that the promisor incumbers himself with heavy liabilities for the sake of a small gain, or, at any rate, an inadequate present gain; and the promisee takes advantage either of the improvidence and moral weakness, or else of the ignorance and unprotected situation of the promisor, or, as stated in the black-letter text, takes an unfair advantage of the promisor's weakness of mind,[61] or of his necessities

[58] Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127. And see Fjone v. Fjone, 16 N. D. 100, 112 N. W. 70. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[59] Ante, p. 224.

[60] Norton v. Norton, 74 Iowa, 161, 37 N. W. 129; Tracey v. Sacket, 1 Ohio St. 54, 58, 59 Am. Dec. 610; Rider v. Miller, 86 N. Y. 507; Morton's Adm'r v. Morton (N. J. Ch.) 8 Atl. 807; Oakey v. Ritchie, 69 Iowa, 69, 28 N. W. 448; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260; Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934; Fishburne v. Ferguson's Heirs, 84 Va. 87, 4 S. E. 575; Moore v. Moore, 56 Cal. 89; Rippy v. Grant, 39 N. C. 443; Churchill v. Scott, 65 Mich. 485, 32 N. W. 737; Zeigler v. Shuler, 87 S. C. 1, 68 S. E. 817; Foote v. De Poy, 126 Iowa, 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. Rep. 365 (mental weakness from age); Miller v. Sterringer, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596 (mental weakness from liquor furnished by other party). *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[61] Selden v. Myers, 20 How. 506, 15 L. Ed. 976. *See "Contracts," Dec. Dig. (Key-No.) §§ 96, 99; Cent. Dig. §§ 441, 448, 1169.*

and distress.[62] The law has attempted by statute in some jurisdictions, as in case of the usury laws, to guard against advantage being taken against persons in such a situation, and courts of equity at one time adopted a rule that purchasers of any reversionary interest might always be called upon to show that they had given full value for their bargains, so that they might not take advantage of a man's present necessities to deprive him of his future estates without reasonable return.[63] The usury laws do not exist in all jurisdictions, and the rule as to reversionary interests has been, to a great extent, abrogated by statute in England, and is recognized in very few cases with us. If, however, a man, even in the absence of usury laws, takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for the amount of money he has actually advanced, with the current rate of interest upon it.[64] "In ordinary cases," it is said, "each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of 'the expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract."[65] The court will look to the reasonableness of the transaction under all the circumstances of the case; and if it appears that one has taken advantage of the unprotected condition of the other to drive a hard bargain,

[62] Moore v. Moore, 81 Cal. 195, 22 Pac. 589, 874; Wooley v. Drew, 49 Mich. 290, 13 N. W. 594; McCants v. Bee, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610. *See "Contracts," Dec. Dig. (Key-No.) §§ 96, 99; Cent. Dig. §§ 441, 448, 1169.*

[63] Chesterfield v. Jansen, 2 Ves. 125; 1 White & T. Lead. Cas. Eq. 428; Jenkins v. Pye, 12 Pet. 241, 9 L. Ed. 1070. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169; "Cancellation of Instruments," Dec. Dig. (Key-No.) §§ 45, 47; Cent. Dig. §§ 100–103.*

[64] Aylesford v. Morris, 8 Ch. 484; Anson, Cont. (4th Ed.) 169. And see cases cited in note 66, infra. The mere fact, however, that exorbitant interest is charged does not show that the contract is unconscionable. Whittier v. Collins, 15 R. I. 44, 23 Atl. 39. Where there is no actual fraud, and no fiduciary relation between the purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid the sale unless it is so great as to shock the moral sense. Mayo's Ex'r v. Carrington's Ex'r, 19 Grat. (Va.) 74; Cribbins v. Markwood, 13 Grat. (Va.) 495, 67 Am. Dec. 775. And see Parmelee v. Cameron, 41 N. Y. 392; Davidson v. Little, 22 Pa. 245, 60 Am. Dec. 81. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169; "Reversions," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[65] O'Rorke v. Bolingbroke, 3 App. Cas. 823. *See "Contracts," Dec. Dig. (Key-No.) §§ 96, 99; Cent. Dig. §§ 441, 448, 1169.*

whether such condition arose from mental or moral weakness or ignorance, or from present necessity and distress, the transaction will not be allowed to stand.[66]

Another case in which this rule has been applied is in the case of a sale of the equity of redemption by a mortgagor to the mortgagee. The sale may be avoided by the mortgagor if any undue advantage was taken of his necessities.[67]

Effect

The rules respecting the right to rescind contracts entered into under undue influence follow, so far as equity is concerned, the rules which apply to fraud,[68] but with one noticeable qualification. In the case of fraud, so soon as the fraud is discovered, the parties are placed on equal terms, and an affirmation of the contract binds the party who was originally defrauded; but in the case of undue influence it is not a particular statement, but a combination of circumstances, which constitutes the vitiating element in the contract, and unless it is clear that the will of the injured party is relieved from the dominant influence under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him.[69] And where it appears that the undue influence existed up to the death of the party, the contract may be avoided by his heirs.[70]

As in the case of duress, the undue influence must have been exercised by or with the cognizance of the other party.[71]

[66] Benyon v. Cook, 10 Ch. 389; Hough's Adm'rs v. Hunt, 2 Ohio, 495, 15 Am. Dec. 569; Boynton v. Hubbard, 7 Mass. 112; Parsons v. Ely, 45 Ill. 232; Butler v. Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; Kelley v. Caplice, 23 Kan. 474, 33 Am. Rep. 179; Jenkins v. Pye, 12 Pet. 241, 9 L. Ed. 1070; Bacon v. Bonham, 33 N. J. Eq. 614, 617; Mastin v. Marlow, 65 N. C. 695. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

[67] Peugh v. Davis, 96 U. S. 337, 24 L. Ed. 775; Oliver v. Cunningham (C. C.) 7 Fed. 689; Dorrill v. Eaton, 35 Mich. 302; Jones, Mtg. (5th Ed.) § 711. *See "Mortgages," Dec. Dig. (Key-No.) § 294; Cent. Dig. §§ 806–814.*

[68] Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622; City Nat. Bank of Dayton v. Kusworm, 91 Wis. 166, 64 N. W. 843; ante, p. 292. *See "Contracts," Dec. Dig. (Key-No.) §§ 97, 98; Cent. Dig. §§ 442–447.*

[69] Anson, Cont. (4th Ed.) 169; Moxon v. Payne, 8 Ch. 881. *See "Contracts," Dig. (Key-No.) §§ 97, 98; Cent. Dig. §§ 442–447.*

[70] Foote v. De Poy, 126 Iowa, 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. Rep. 365. *See "Contracts," Dec. Dig. (Key-No.) §§ 96–98; Cent. Dig. §§ 441–448.*

[71] Dent v. Long, 90 Ala. 172, 7 South. 640. Contra, where the other party has not paid a valuable consideration, Graham v. Burch, 44 Minn. 33, 46 N. W. 148. *See "Contracts," Dec. Dig. (Key-No.) § 96; Cent. Dig. §§ 441, 1169.*

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CHAPTER VIII

LEGALITY OF OBJECT

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IN GENERAL

147. An agreement is not enforceable at law, and therefore does not result in a contract, if its object is illegal.

We come now to deal with the only remaining element in the formation of a valid contract—the legality of the matter or object of the agreement. To result in a contract, an agreement must create an obligation; and it does not create an obligation if it is such that the courts cannot enforce it. An agreement, therefore, which is illegal or unlawful, is in fact no contract at all, though it is often spoken of as an illegal contract.

As a rule the law does not interfere with the freedom of persons to enter into contracts, but some limitations are imposed. Certain objects are forbidden, and though all the other elements necessary to the formation of a valid contract may be present, yet if one of

these forbidden objects is contemplated by the parties, the courts will not enforce their agreement. The object makes the agreement unlawful.[1]

CLASSIFICATION OF UNLAWFUL AGREEMENTS

148. For convenience in treatment, unlawful agreements may be classified, according to their matter or object, as

(a) Agreements in violation of positive law; and

(b) Agreements contrary to public policy.

The distinction here made between agreements in violation of positive law and agreements contrary to public policy is in the reasons which determine the law to hold the agreement void, and not in the nature or operation of the law itself. The nullity of the agreement itself is in every case a matter of positive law;[2] but in one class of cases the acts contemplated by the agreement are prohibited by the common law or by statute, while in the other the prohibition rests more particularly on public policy, or, as it is sometimes called, the "policy of the law." It is not always easy to distinguish between the two classes, for frequent decisions upon certain matters of public policy have established such definite rules regarding them that they are in effect rules of the common law. Too much importance, therefore, must not be attached to any classification of the subject.

AGREEMENTS IN VIOLATION OF POSITIVE LAW

149. Any agreement which involves the doing of an act which is positively forbidden by law, or, what amounts to the same thing, the omission to do an act which is positively enjoined by law, is illegal and void. Acts may be so prohibited or enjoined

(a) By the rules of the common law; or

(b) By statute.

There are many acts which the law positively forbids or enjoins, and to the doing or omission of which some penalty is attached.

[1] Edgar Lumber Co. v. Cornie Stave Co., 95 Ark. 449, 130 S. W. 452; Piper v. Boston & M. R. R., 75 N. H. 435, 75 Atl. 1041; Crigler v. Shepler, 101 Pac. 619, 23 L. R. A. (N. S.) 500, 79 Kan. 834. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

[2] Pol. Cont. (3d Ed.) 251.

Whether the prohibition or injunction is by the common law or by statute is altogether immaterial. So it does not matter whether the act to be performed is malum in se or malum prohibitum.[3] The act or omission prohibited may be some grievous crime, such as murder; or it may be an act or omission prohibited merely as a police regulation, as in the case of statutes regulating the conduct of a particular trade or business, with only a small fine as the penalty; or again it may be only a civil wrong. All of these cases stand on the same footing. If the subject-matter or object of an agreement is such that its performance would consist in an act or omission so forbidden, or be so connected therewith as to be in substance part of the same transaction, the courts will not enforce it.

SAME—BREACH OF RULES OF COMMON LAW

150. The agreements which are illegal because they are in breach of rules of the common law are:

(a) Agreements involving the commission of crime; and

(b) Agreements involving the commission of a civil wrong.

This classification, like that in the preceding section, is, from the nature of the subject, only approximate, and for convenience in treatment. Many acts are prohibited by statute which were formerly prohibited by the common law, and many acts which are prohibited by the common law in one state are prohibited by statute in another, and in some states there are no common-law crimes at all. For this reason, in treating of agreements in breach of rules of the common law we must include agreements in breach of statutes which are merely declaratory of the common law.

Agreements Involving the Commission of Crime

The simplest instance of an agreement contrary to positive law is an agreement to commit a crime or indictable offense. Every agreement to commit a crime or indictable offense, either as the final object or as a means to an object which, except for such means, would be lawful, is illegal and void. "If one bind himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void."[4] An agreement, therefore, to write, print, or publish a libelous book

[3] Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

[4] Shep. Touch. 370.

or article,[5] or an obscene book, article, or picture [6] is void. And so it is with an agreement to commit an assault.[7] Not only are such agreements illegal and void, but the agreement itself is a crime known in the criminal law as a "conspiracy." The crime of conspiracy is also committed in some cases where it is agreed to commit some civil wrong; but the invalidity of such an agreement does not need to rest on its criminal character.

Agreement to Commit Civil Wrong

An agreement will generally be illegal if it contemplates a civil wrong to a third person, though the wrong may not be an indictable offense, and though the agreement may not amount to the crime of conspiracy. An agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself lawful, by means of a trespass, breach of contract, or breach of trust, is unlawful and void. The acts contemplated, though not necessarily criminal, are contrary to positive law.[8]

Same—Frauds on Creditors

Among the agreements void because they involve a civil wrong are agreements in fraud of creditors. Thus, in case of compositions with creditors, if in order to procure the consent of some particular creditor, or for any other reason, the debtor secretly promises him some advantage over the others, the agreement is void. In a composition with creditors, "each creditor consents to lose part of his

[5] Post, p. 819.

[6] Poplett v. Stockdale, 1 Ryan & M. 337; Gale v. Leckie, 2 Starkie, 107. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

[7] Allen v. Rescous, 2 Lev. 174. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

[8] Scott v. Brown [1892] 2 Q. B. 724; Begbie v. Sewage Co., L. R. 10 Q. B. 491; Clement's Appeal, 52 Conn. 464; Allen v. Rescous, 2 Lev. 174; Hatch v. Mann, 15 Wend. (N. Y.) 44; Davis v. Arledge, 3 Hill (S. C.) 170, 30 Am. Dec. 360; McCall's Adm'r v. Capehart, 20 Ala. 521; Gleason v. Railroad Co. (Iowa) 43 N. W. 517; Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; Huckins v. Hunt, 138 Mass. 366; Gray v. McReynolds, 65 Iowa, 461, 21 N. W. 777, 54 Am. Rep. 16; Bloss v. Bloomer, 23 Barb. (N. Y.) 604; Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369; Smith v. Humphreys, 88 Me. 345, 34 Atl. 166; post, p. 360, note 78. Where A. pays B. for goods for C., intending that C. shall not have to pay anything, and B. and C. secretly agree for a further payment by C., the agreement is void as a fraud on A. Jackson v. Duchaire, 3 Term R. 551. Perpetration of fraud on the public. Materne v. Horwitz, 101 N. Y. 469, 5 N. E. 331; Jerome v. Bigelow, 66 Ill. 452, 16 Am. Rep. 597. Contract for use of name of musical director for band with which he is not connected. Blakely v. Sousa, 197 Pa. 335, 47 Atl. 286. See, also, Messer v. The Fadettes, 168 Mass. 140, 46 N. E. 407, 37 L. R. A. 721, 60 Am. St. Rep. 371. *See "Contracts," Dec. Dig. (Key-No.) § 109; Cent. Dig. §§ 469, 483.*

debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no advantage from it, but he is also to lose the benefit of the composition." [9] A creditor who has not participated in the fraud may repudiate the composition and recover on the original claim.[10]

Same—Fraud in Connection with Sales at Auction

Where property is put up for sale at public auction, any agreement between the auctioneer or person having control of the sale and third persons by which fictitious bids are to be made, so as to raise the price, is a fraud on the purchaser,[11] and no rights can be based upon it. A person, for instance, engaged to make fictitious bids, could not recover compensation promised him. We are here speaking of illegal agreements only, and therefore have nothing to do with the rights of the purchaser at an auction sale.

[9] Mullalieu v. Hodgson, 16 Q. B. 689; Frost v. Gage, 3 Allen (Mass.) 560; Partridge v. Messer, 14 Gray (Mass.) 180; Ramsdell v. Edgarton, 8 Metc. (Mass.) 227, 41 Am. Dec. 503; Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046; Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; Cobleigh v. Pierce, 32 Vt. 788; O'Shea v. Oil Co., 42 Mo. 397, 97 Am. Dec. 332; Way v. Langley, 15 Ohio St. 392; Frieberg v. Treitschke, 36 Neb. 880, 55 N. W. 273; Hefter v. Cahn, 73 Ill. 296; Huckins v. Hunt, 138 Mass. 366; Brown v. Neally, 161 Mass. 1, 36 N. E. 464; Powers Dry Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Merritt v. Bucknam, 90 Me. 146, 37 Atl. 885. It has been held, however, in New York, that the secret agreement only is void, and that the preferred creditor may still have the benefit of the composition agreement. Hanover Nat. Bank v. Blake, 142 N. Y. 406, 37 N. E. 519, 27 L. R. A. 33, 40 Am. St. Rep. 607. See, also, White v. Kuntz, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886; Cheveront v. Textor, 53 Md. 295. A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge, or to a composition, is void; and it does not matter whether it was made with the debtor or with a stranger, Higgins v. Pitt, 4 Ex. 312; Kullman v. Greenebaum, supra; nor whether the consideration for such withdrawal is to come out of the debtor's assets or not, Hall v. Dyson, 17 Q. B. 785; Kullman v. Greenebaum, supra; and this is true though it be part of the agreement not to prove against the estate at all, McKewan v. Sanderson, 20 Eq. 65. *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–523.*

[10] Zell Guano Co. v. Emry, 113 N. C. 85, 18 S. E. 89; Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; Powers Dry Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460. *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–523.*

[11] Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564; Moncrieff v. Goldsborough, 4 Har. & McH. (Md.) 281, 1 Am. Dec. 407; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398;

His contract is not illegal. He can avoid it,[12] but this is because of the fraud, not because of any illegality. The illegality is in the agreement to commit the fraud. The sale is not illegal, but merely voidable at the purchaser's option.

In like manner agreements between persons for the purpose of deterring bidders and preventing competition at an auction sale are illegal as being a fraud on the owner, and the parties to such an agreement can claim no rights under it.[13] This rule, however, does not prevent parties from entering into a bona fide arrangement to purchase property at auction on their joint account, or for other proper purposes.[14]

Same—Publication of Libel

Since it is a civil wrong to publish a libelous book or article, even when it does not constitute a crime, an agreement contemplating such a publication is illegal. No action will lie, therefore, to recover compensation for printing or publishing a libelous book, or for breach of a contract to print or publish it, or on an agreement to indemnify against liability for publishing it.[15] In

Pennock's Appeal, 14 Pa. 446, 53 Am. Dec. 561; Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492. *See "Contracts," Dec. Dig. (Key-No.) § 120; Cent. Dig. § 654.*

[12] Otherwise if the bidder, though employed by one interested in the sale, can be compelled by the auctioneer to take the property. McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345, 78 Am. St. Rep. 93. *See "Contracts," Dec. Dig. (Key-No.) § 120; Cent. Dig. § 654.*

[13] Gibbs v. Smith, 115 Mass. 592; Ray v. Mackin, 100 Ill. 246; Doolin v. Ward, 6 Johns. (N. Y.) 194; Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678; Barton v. Benson, 126 Pa. 431, 17 Atl. 642, 12 Am. St. Rep. 883; Gardiner v. Morse, 25 Me. 140; Goldman v. Oppenheim, 118 Ind. 95, 20 N. E. 635; Wooten v. Hinkle, 20 Mo. 290; Atlas Nat. Bank v. Holm, 71 Fed. 489, 19 C. C. A. 94; De Baun v. Brand, 60 N. J. Law, 283, 37 Atl. 726; Hallam v. Huffman, 5 Kan. App. 303, 48 Pac. 602; McClelland v. Bank, 60 Neb. 90, 82 N. W. 319. A contract made by a purchaser at a judicial sale, before confirmation, to sell his bargain to another at an advanced price, is illegal. Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873. *See "Contracts," Dec. Dig. (Key-No.) § 119; Cent. Dig. §§ 654–658.*

[14] Gibbs v. Smith, 115 Mass. 592; Smith v. Ulman, 58 Md. 183, 42 Am. Rep. 329; Phippen v. Stickney, 3 Metc. (Mass.) 388; Garrett v. Moss, 20 Ill. 549; Marie v. Garrison, 83 N. Y. 14; Smull v. Jones, 1 Watts & S. (Pa.) 128; Id., 6 Watts & S. (Pa.) 122; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Kearney v. Taylor, 15 How. 494, 14 L. Ed. 787; Wicker v. Hoppock, 6 Wall. 94, 18 L. Ed. 752; Barnes v. Morrison, 97 Va. 372, 34 S. E. 93; Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741; Fidelity Ins. & Safe-Deposit Co. v. Railway Co. (C. C.) 98 Fed. 475 (agreement by bondholders to purchase on foreclosure). A contract violating the state constitution is void. San Antonio Irr. Co. v. Deutschmann, 102 Tex. 201, 105 S. W. 486, 114 S. W. 1174. *See "Contracts," Dec. Dig. (Key-No.) § 119; Cent. Dig. §§ 654–658.*

[15] Shackell v. Rosier, 2 Bing. N. C. 634; ATKINS v. JOHNSON, 43 Vt. 78,

order to render such a contract illegal, "it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter; or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter; or that the contract on its face provided for or promoted an illegal act." [16]

Same—Illegality Distinguished from Fraud

Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act; but fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract. Fraud may vitiate a contract because it prevents the consent of the other from being genuine; and in such case the contract can be avoided by the party defrauded, because his consent was unreal.

SAME—AGREEMENTS IN BREACH OF STATUTE—CONSTITUTIONAL LAW

151. The legislature, in the exercise of its police power, may regulate or prohibit the making of contracts.

The United States, or a state, in the exercise of its police power, may regulate or prohibit the making of contracts where, in the judgment of the legislature, the public good requires the restriction, and ordinarily the courts will not review its judgment as to the propriety of the law. There is, however, some limitation to the police power. The federal constitution protects the vested rights of the people, and prohibits congress and the state legislatures from passing any law which shall deprive a citizen of his liberty or property without due process of law. The courts are bound to enforce the constitution even as against the legislatures; and if the legislature, assuming to act under the police power of the state, should pass a statute depriving a person of the right to make contracts, where the public good clearly does not require such interference, the statute would be unconstitutional and void.[17]

5 Am. Rep. 260, Throckmorton Cas. Contracts, 219; Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555; Ives v. Jones, 25 N. C. 538, 40 Am. Dec. 421; Clay v. Yates, 1 Hurl. & N. 73. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. § 474.*

[16] Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. 1087. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. § 474.*

[17] Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; In re Jacobs, 98 N.

A discussion of the police power and of its limitations, however, in its bearings upon the power of the legislature in this regard, is beyond the scope of this book.

SAME—PROHIBITION BY STATUTE

152. In determining whether a contract, or an act or omission involved in the performance of a contract, is prohibited by statute, the intention of a legislature must be ascertained, and must govern; and in ascertaining the intention the court will look to the language and subject-matter of the statute, and the evil which it seeks to prevent. Subject to this fundamental rule, the following rules of construction, which are frequently applied, may be stated:

(a) Where the statute imposes a penalty for an act or omission, this is prima facie evidence of intention to prohibit.

(b) If the object of the penalty is protection of the public, it amounts to a prohibition; but if the object is solely for revenue purposes, the act or omission is not prohibited.

Where it is contended that an agreement is illegal as being in violation of a statute, the question is whether the acts contemplated are prohibited by the statute; and the answer to this question depends upon the construction of the statute. In all cases the intention of the legislature must govern.[18] If a statute was intended to prohibit a particular agreement, or the acts involved in its performance, then that agreement is clearly illegal.

The law does not make any distinction between acts which are mala in se, and which for this reason are prohibited by statute, and acts which are mala prohibita, or wrong merely because they are prohibited by statute. If the statute prohibits an act, an agreement involving its commission is illegal, without regard

Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354. *See "Constitutional Law," Dec. Dig. (Key-No.) § 276; Cent. Dig. §§ 845, 846.*

[18] Cope v. Rowlands, 2 Mees. & W. 149; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; Bowditch v. Insurance Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; Aiken v. Blaisdell, 41 Vt. 655; Griffith v. Wells, 3 Denio (N. Y.) 226; Harris v. Runnels, 12 How. 79, 13 L. Ed. 901; Pangborn v. Westlake, 36 Iowa, 546; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; Lester v. Bank, 33 Md. 558, 3 Am. Rep. 211; Ruckman v. Bergholz, 37 N. J. Law, 437; McKeever v. Beacom, 101 Iowa, 173, 70 N. W. 112. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 478–497.*

to the ground of prohibition, or the morality or immorality of the act.[19]

Prohibition—Effect of Penalty

A statute may render an agreement illegal by express prohibition or by imposing a penalty without an express prohibition. Where the statute expressly provides that a violation thereof shall constitute a misdemeanor, a contract in violation of it is illegal, although the statute does not in express terms prohibit the contract nor declare it void.[20]

Some cases hold that, whenever a statute imposes a penalty for an act or omission, it impliedly prohibits it;[21] but, according to the weight of authority, the imposition of a penalty is only prima facie evidence of an intention to prohibit.[22] The intention of the legislature will always govern, and the court will look to the language and subject-matter of the act and to the evil which it seeks to prevent. A consideration which receives weight is whether the object of the penalty is protection to the public and not merely revenue; for if the penalty is designed to further the interests of public policy, as to protect the public against fraud or imposition, or to protect health or morals, safety or good

[19] Bank of U. S. v. Owens, 2 Pet. 527, 539, 7 L. Ed. 508; Bensley v. Bignold, 5 Barn. & Ald. 335; Aubert v. Maze, 2 Bos. & P. 371; White v. Buss, 3 Cush. (Mass.) 448; Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Penn v. Bornman, 102 Ill. 523; Lewis v. Welch, 14 N. H. 294; William Wilcox Mfg. Co. v. Brazos, 74 Conn. 208, 50 Atl. 722. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 478–497.*

[20] Pinney v. First Nat. Bank, 68 Kan. 223, 75 Pac. 119, 1 Ann. Cas. 831; Smith v. Robertson, 106 Ky. 472, 50 S. W. 852, 45 L. R. A. 510; Beecher v. Peru Trust Co., 49 Ind. App. 184, 97 N. E. 23. And see Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856, 39 L. R. A. (N. S.) 231, Ann. Cas. 1913B, 405 (holding that the owner of a building who is guilty of a misdemeanor in failing to equip it with fire escapes as required by statute cannot maintain an action for the rent thereof). *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

[21] Miller v. Post, 1 Allen (Mass.) 434; Hallett v. Novion, 14 Johns. (N. Y.) 273, 290; Pray v. Burbank, 10 N. H. 377; Doe v. Burnham, 31 N. H. 426; Durgin v. Dyer, 68 Me. 143; Kleckley v. Leyden, 63 Ga. 215; McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Bacon v. Lee, 4 Iowa, 490; Randall v. Tuell, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143; Sandage v. Manufacturing Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Edgerly v. Hale, 71 N. H. 138, 51 Atl. 679. *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

[22] Bensley v. Bignold, 5 Barn. & Ald. 335; Cope v. Rowlands, 2 Mees. & W. 149; Griffith v. Wells, 3 Denio (N. Y.) 226; Hunt v. Knickerbacker, 5 Johns. (N. Y.) 327; President, etc., of Springfield Bank v. Merrick, 14 Mass. 322; Siedenbender v. Charles' Adm'rs, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682; Penn v. Bornman, 102 Ill. 523. See, also, cases in note 18, supra. *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

order, it amounts to a prohibition;[23] but if it is designed solely for revenue purposes, a contract in violation of the statute is not necessarily prohibited.[24] The propriety of applying a different rule to statutes designed for revenue purposes, however, has been questioned.[25] Another consideration, which sometimes receives weight, is whether the penalty is recurrent upon every breach of the provisions of the statute; for, if it is recurrent, the inference is that the penalty amounts to a prohibition.[26]

The absence of a penalty or the failure of the penal clause in the particular instance will not prevent the court from giving effect to an express prohibition.[27]

Doing Indirectly What Cannot be Done Directly

What the law forbids to be done directly cannot be made lawful by doing it indirectly.[28] Where a bank, for instance, which was itself prohibited from entering into a particular transaction, procured its manager to appear in the transaction for its benefit, it was held that the transaction was unlawful, "upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance." [29]

[23] Cope v. Rowlands, 2 Mees. & W. 149; Cundell v. Dawson, 4 C. B. 376; Griffith v. Wells, 3 Denio (N. Y.) 226; Seidenbender v. Charles' Adm'rs, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682; Penn v. Bornman, 102 Ill. 523; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Smith v. Robertson (Ky.) 50 S. W. 852, 45 L. R. A. 510; Victorian Daylesford Syndicate v. Dott, 74 Law J. Ch. 673, [1905] 2 Ch. 624, 93 Law T. 627, 21 Times Law R. 742. *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

[24] Brown v. Duncan, 10 Barn. & C. 93; Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346; Corning v. Abbott, 54 N. H. 469; Aiken v. Blaisdell, 41 Vt. 655; Ruckman v. Bergholz, 37 N. J. Law, 437; Rahter v. First Nat. Bank, 92 Pa. 393; Mandlebaum v. Gregovich, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433; Vermont Loan & Trust Co. v. Hoffman, 5 Idaho, 376, 49 Pac. 314, 37 L. R. A. 509, 95 Am. St. Rep. 186. *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

[25] See Cope v. Rowlands, 2 Mees. & W. 149; Territt v. Bartlett, 21 Vt. 184; Aiken v. Blaisdell, 41 Vt. 655. *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

[26] Ritchie v. Smith, 6 C. B. 462; Anson, Cont. (8th Ed.) 185; Smith v. Robertson, 106 Ky. 472, 50 S. W. 852, 45 L. R. A. 510. *See "Contracts," Dec. Dig. (Key-No.) § 107; Cent. Dig. § 479.*

[27] Pol. Cont. (3d Ed.) 271; Sussex Peerage Case, 11 Clark & F. 148, 149. See, also, Union Nat. Bank v. Louisville, N. A. & C. Ry. Co., 145 Ill. 208, 34 N. E. 135; Johnson v. Berry, 20 S. D. 133, 104 N. W. 1114, 1 L. R. A. (N. S.) 1159. *See "Contracts," Dec. Dig. (Key-No.) § 106; Cent. Dig. § 477.*

[28] Booth v. Bank of England, 7 Clark & F. 509, 540; Bank of U. S. v. Owens, 2 Pet. 527, 536, 7 L. Ed. 508; Wells v. People, 71 Ill. 532. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

[29] Booth v. Bank of England, supra. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

So, where the charter of a bank forbade the taking of a greater rate of interest than 6 per cent., but did not say that an agreement should be void in which such interest was taken, the supreme court of the United States held that a transaction by which the bank discounted a note at more than 6 per cent. was void, though the charter did not expressly prohibit an "agreement" to take higher interest, but spoke only of "taking," not of "reserving," interest. The court said: "A fraud upon a statute is a violation of the statute. * * * It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict a penalty * * * it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offense; but, when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do." [30]

Same—Agreements Prohibited but Declared Not Void

An agreement forbidden by statute may be saved from being void by the statute itself. Where a statute forbids an agreement, but says that, if made, it shall not be void, then, if made, it is a contract which the courts must enforce.[31]

Same—Agreements Simply Void and Unenforceable

Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, neither the agreement itself nor its performance is to be treated as unlawful for any other purpose.[32]

SAME—PARTICULAR AGREEMENTS IN BREACH OF STATUTE

153. Among the statutes prohibiting agreements, the following may be mentioned as the most important:

(a) Statutes regulating the conduct of a particular trade, business, or profession, or regulating dealings in particular articles of commerce.

(b) Statutes regulating the traffic in intoxicating liquors.

(c) Statutes prohibiting labor, business, etc., on Sunday.

[30] Bank of U. S. v. Owens, 2 Pet. 527, 7 L. Ed. 508. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468-497.*

[31] Lewis v. Bright, 4 El. & Bl. 917. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468-497.*

[32] Post, p. 419.

(d) Statutes prohibiting the taking of usury.

(e) Statutes prohibiting gaming and wagers. This head includes statutes prohibiting the buying and selling of stocks or commodities for future delivery, where the parties intend, not an actual delivery, but a settlement by paying the difference between the market and the contract price.[83]

(f) Statutes prohibiting lotteries.

Regulating Trade, Profession, or Business

There are numerous statutes in all of the states, enacted for the purpose of protecting the public in dealing with certain classes of traders or professional men, and with certain articles of commerce. Protection to the public is generally the object of these statutes, and they are construed as prohibiting contracts entered into without having complied with the prescribed conditions. As falling within this class may be mentioned statutes imposing a penalty on dealers who fail to have the weights, measures, or scales used by them approved and sealed by the proper officer. Such a statute is for the protection of the public against fraud and imposition, and amounts to a prohibition of sales in measures or by weights or scales not sealed, so that a dealer who has made such a sale cannot recover the price.[84]

Falling within this class are also statutes requiring professional men, such as lawyers, physicians and surgeons, and others, to procure a license, certificate, or diploma as a condition precedent to the right to engage in the practice of their profession. These statutes are intended to protect the public against incompetent and unqualified practitioners, and a person coming within the statute cannot recover for his services if he has not complied with its provisions.[85]

[83] Independently of statute, wagers on subjects in which the parties have no interest are, in this country, generally held illegal, as being contrary to public policy. Post, p. 342.

[84] Miller v. Post, 1 Allen (Mass.) 434; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Eaton v. Kegan, 114 Mass. 433. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. § 491.*

[85] Lawyers. Hall v. Bishop, 3 Daly (N. Y.) 109; Ames v. Gilman, 10 Metc. (Mass.) 239; Hittson v. Brown, 3 Colo. 304. But see Yates v. Robertson, 80 Va. 475; Harland v. Lilienthal, 53 N. Y. 438. Physicians and surgeons. Bailey v. Mogg, 4 Denio (N. Y.) 60; Alcott v. Barber, 1 Wend. (N. Y.) 526; Orr v. Meek, 111 Ind. 40, 11 N. E. 787; Coyle v. Campbell, 10 Ga. 570; Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Davidson v. Bohlman, 37 Mo. App. 576; Richardson v. Dorman, 28 Ala. 679; Jordan v. Dayton, 4 Ohio, 295; Underwood v. Scott, 43 Kan. 714, 23 Pac. 942; Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567; Dow v. Haley, 30 N. J. Law, 354; Adams v. Stewart, 5 Har. (Del.) 144; Haworth v. Montgomery, 91 Tenn. 16, 18 S. W.

There are also, in most of the states, statutes regulating dealings with certain articles of commerce. They are designed either for the protection of the public against fraud or imposition from the sale of a spurious article, or for the protection of the public health against adulterated articles of food, or dangerous substances, such as powder and poisons.[36] Sales of fertilizers, for instance, have been held illegal where the article was not inspected or labeled as required by statute.[37]

In many of the states there are statutes prohibiting the employment of young children in factories, and a contract for such employment would be illegal, so that a father could not recover for the services of a child so employed.[38]

But if a statute imposing a penalty for engaging in business without a license is enacted, not for the protection of the public, but for the purpose of raising revenue, it does not render void contracts made in violation thereof.[39]

399; Hargan v. Purdy, 93 Ky. 424, 20 S. W. 432; Roberts v. Levy (Cal.) 31 Pac. 570. Unlicensed real estate broker. Buckley v. Humason, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230. Unlicensed stockbroker. Cope v. Rowlands, 2 Mees. & W. 149; Hustis v. Pickards, 27 Ill. App. 270. School teacher without certificate. Ryan v. School Dist., 27 Minn. 433, 8 N. W. 146; Wells v. People, 71 Ill. 532. Unqualified conveyancer. Taylor v. Gas Co., 10 Exch. 293. Unlicensed plumber. Johnston v. Dahlgren, 31 App. Div. 204, 52 N. Y. Supp. 555. Innkeeper. Randall v. Tuell, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143. Keeper of stallion. Smith v. Robertson, 106 Ky. 472, 50 S. W. 852; Nelson v. Beck, 89 Me. 264, 36 Atl. 374. *See "Attorney and Client," Dec. Dig. (Key-No.) § 136; Cent. Dig. § 298; "Physicians and Surgeons," Dec. Dig. (Key-No.) § 22; Cent. Dig. § 51; "Brokers," Dec. Dig. (Key-No.) § 42; Cent. Dig. § 43.*

[36] Sale of oleomargarine. Waterbury v. Egan, 3 Misc. Rep. 355, 23 N. Y. Supp. 115; Braun v. Keally, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811. Sales by unregistered pharmacist in charge of drug store in violation of statute. Shattuck v. Watson, 164 Mich. 167, 129 N. W. 196. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

[37] McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Conley v. Sims, 71 Ga. 161; Johnston v. McConnell, 65 Ga. 129; Baker v. Burton (C. C.) 31 Fed. 401; Williams v. Barfield (C. C.) 31 Fed. 398; Campbell v. Segars, 81 Ala. 259, 1 South. 714; VANMETER v. SPURRIER, 94 Ky. 22, 21 S. W. 337, Throckmorton Cas. Contracts, 222. Contra, Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

[38] Birkett v. Chatterton, 13 R. I. 299, 43 Am. Rep. 30. Under eight-hour law, making violation of act a misdemeanor, an employé cannot recover for overtime. Short v. Mining Co., 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

[39] Sunflower Lumber Co. v. Turner Supply Co., 158 Ala. 191, 48 South. 510, 132 Am. St. Rep. 20 [cit. Clark on Contracts (1st Ed.) 385]. *See "Contracts," Dec. Dig. (Key-No.) § 106; Cent. Dig. § 477.*

Further illustrations of statutes within this class are referred to below.[40]

Same—Traffic in Intoxicating Liquors [41]

Where a statute in terms prohibits the sale of intoxicating liquors, a contract of sale is of course invalid. Some difficulty has arisen where the statute was not absolutely prohibitory, but merely prescribed certain conditions to be complied with by dealers. An example is where a statute imposes a penalty for selling without a license. It is generally held that such a statute is not merely for purposes of revenue, but is to diminish the evils of intemperance, and prevent disreputable and objectionable persons from engaging in the business, and that sales without a license are prohibited and rendered illegal.[42]

Somewhat in line with these statutes are those which regulate the conduct of saloons, such as statutes prohibiting billiard tables, bowling alleys, etc., in connection with a saloon. An agreement in breach of such a statute is illegal. A carpenter, for instance, cannot recover the price of erecting a bowling alley in a building appurtenant to a tavern, where a statute prohibits it from being so kept.[43]

So, also, under a statute imposing a penalty on any person owning or controlling any premises who shall suffer them to be used for the sale of spirituous liquors, a person who owns a building, and has knowledge that his tenant at will is using the premises

[40] Loan by pawnbroker who has neglected to comply with statute. Fergusson v. Norman, 5 Bing. N. C. 76. Failure of printer to print his name on the work as required by statute. Bensley v. Bignold, 5 Barn. & Ald. 335. Unlicensed peddlers. Stewartson v. Lothrop, 12 Gray (Mass.) 52. Agreement to construct building not complying with building regulations. Stevens v. Gourley, 7 C. B. (N. S.) 99; Burger v. Koelsch, 77 Hun, 44, 28 N. Y. Supp. 460. Failure to measure wood sold, as required by statute. Pray v. Burbank, 10 N. H. 377. Agreement for threshing grain, where machine is not boxed as required by a statute, intended to prevent injury to workmen. Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145. Sale of shingles not of size prescribed. Wheeler v. Russell, 17 Mass. 258. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

[41] On this subject, see Black, Intox. Liq. §§ 242–276.

[42] Griffith v. Wells, 3 Denio (N. Y.) 226; Territt v. Bartlett, 21 Vt. 184; Aiken v. Blaisdell, 41 Vt. 655; O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. 527; Vannoy v. Patton, 5 B. Mon. (Ky.) 248; Solomon v. Dreschler, 4 Minn. 278 (Gil. 197); Lewis v. Welch, 14 N. H. 294; Cobb v. Billings, 23 Me. 470; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; Bach v. Smith, 2 Wash. T. 145, 3 Pac. 831. *See "Intoxicating Liquors," Dec. Dig. (Key-No.) §§ 327–330; Cent. Dig. §§ 467–485.*

[43] Spurgeon v. McElwain, 6 Ohio, 442, 27 Am. Dec. 266. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

for the sale of spirituous liquors, and who permits him to continue in possession, cannot recover for use and occupation.[44]

Contracts in Breach of Sunday Laws

The common law does not prohibit the making of contracts on Sunday, and, in the absence of statutory prohibition, such contracts are as valid as if made on any other day.[45] In most states, however, statutes have been enacted on the subject.[46]

Where the statute expressly prohibits the making of contracts on Sunday, and declares that they shall be void, there should be no difficulty in applying it;[47] and, if a statute prohibits servile work and labor on Sunday, there can of course be no recovery for such work.[48]

Where it is provided that no person shall do any labor, work, or business on Sunday, all secular business is prohibited. Not only would a contract to do work on Sunday, made on some other day, be illegal because of the object,[49] but a contract made on Sunday to work on another day would be likewise prohibited. The making of a contract is secular business, within the meaning of the statute.[50] But where the prohibition is only against servile work

[44] Mitchell v. Scott, 62 N. H. 596; post, p. 414. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 468–497.*

[45] Story v. Elliott, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; Sayles v. Smith, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117; Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445; Bloom v. Richards, 2 Ohio St. 387; Swann v. Swann (C. C.) 21 Fed. 299; Adams v. Gay, 19 Vt. 358; Brown v. Browning, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[46] Sunday laws are not an unconstitutional interference with the religious liberty of the people. State v. O'Rourk, 35 Neb. 614, 53 N. W. 591, 17 L. R. A. 830; State v. Judge, 39 La. Ann. 132, 1 South. 437; Scales v. State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768; Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716; Hennington v. State, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[47] Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332. In Maine, and probably in some of the other states, the statute provides that the defense that a contract was executed on Sunday cannot be made to an action thereon unless the consideration is returned. Wentworth v. Woodside, 79 Me. 156, 8 Atl. 763; First Nat. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794; Wheelden v. Lyford, 84 Me. 114, 24 Atl. 793. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[48] Watts v. Van Ness, 1 Hill (N. Y.) 76. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[49] HANDY v. ST. PAUL GLOBE PUB. CO., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695, Throckmorton Cas. Contracts, 227. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[50] Northrup v. Foot, 14 Wend. (N. Y.) 248; Pattee v. Greely, 13 Metc. (Mass.) 284; Towle v. Larrabee, 26 Me. 464; Lyon v. Strong, 6 Vt. 219; Var-

and labor, the making of contracts, including the execution of commercial paper, is not generally regarded as included.[51] Again, if the prohibition is confined to labor, business, or work of a man's "ordinary calling," contracts or other business or work on Sunday by a person is not illegal unless it is within his ordinary calling.[52] A real-estate broker or lawyer, therefore, would not violate the statute by purchasing or selling a horse on Sunday. If the statute prohibits the exposure of merchandise for sale on Sunday, the prohibition extends only to public sales, and does not prevent private contracts of sale without such exposure.[53]

Same—Works of Necessity or Charity

In all of the states the statutes expressly except from the prohibition works of necessity or charity, but as to what constitutes a work of necessity or charity the authorities are somewhat con-

ney v. French, 19 N. H. 233; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Id. (N. J.) 25 Atl. 474; Calhoun v. Phillips, 87 Ga. 482, 13 S. E. 593; Goss v. Whitney, 27 Vt. 272; Kepner v. Keefer, 6 Watts (Pa.) 231, 31 Am. Dec. 460; Smith v. Railway Co., 83 Wis. 271, 50 N. W. 497, 53 N. W. 550; Brazee v. Bryant, 50 Mich. 136, 15 N. W. 49; Durant v. Rhener, 26 Minn. 362, 4 N. W. 610. A notice to a tenant. Cannon v. Ryan, 49 N. J. Law, 314, 8 Atl. 293. Indorsement of note. First Nat. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794. Selling of soda water by a druggist is "worldly employment." Splane v. Commonwealth (Pa.) 12 Atl. 431. Extension of time of payment of debt. Rush v. Rush (N. J. Ch.) 18 Atl. 221. Casual execution of note is not "labor." Holden v. O'Brien, 86 Minn. 297, 90 N. W. 531. *See "Sunday," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 36–44.*

[51] Birks v. French, 21 Kan. 238; Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445; Boynton v. Page, 13 Wend. (N. Y.) 425. Contra, Reynolds v. Stevenson, 4 Ind. 619; Link v. Clemmens, 7 Blackf. (Ind.) 479. Sale of tickets by manager of theater, and superintending Sunday performance, is "laboring." Quarles v. State, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192. Running excursion steamboat is "worldly employment." Commonwealth v. Rees, 10 Pa. Co. Ct. R. 545. Acknowledgment of debt barred by statute of limitations. Thomas v. Hunter, 29 Md. 406. Athletic games and sports are not within the prohibition against labor. St. Louis Agr. & Mech. Ass'n v. Delano, 37 Mo. App. 284; Id., 108 Mo. 217, 18 S. W. 1101. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[52] Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790 (construing the Rhode Island statute); Allen v. Gardner, 7 R. I. 22; Amis v. Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463; Sanders v. Johnson, 29 Ga. 526; Mills v. Williams, 16 S. C. 593; Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684; Swann v. Swann (C. C.) 21 Fed. 299. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[53] Boynton v. Page, 13 Wend. (N. Y.) 425; Batsford v. Every, 44 Barb. (N. Y.) 618. See, also, Ward v. Ward, 75 Minn. 269, 77 N. W. 965. But public exposure and sale of newspapers is within the statute. Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302. The statute also applies to slot machines automatically vending wares. Cain v. Daly, 74 S. C. 480, 55 S. E. 110. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

flicting. As a rule, whatever must be done in order to preserve life or health [54] or property,[55] and must be done on Sunday if done at all, is a work of necessity.[56] If property is in imminent danger,

[54] Smith v. Watson, 14 Vt. 332; Aldrich v. Blackstone, 128 Mass. 148. *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

[55] Johnson v. People, 42 Ill. App. 594 (reaping field of grain); Whitcomb v. Gilman, 35 Vt. 297; Parmelee v. Wilks, 22 Barb. (N. Y.) 539; State v. McBee, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638. *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

[56] "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute." Flagg v. Inhabitants, 4 Cush. (Mass.) 243. And see Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332. The following contracts have been held to be within the exceptions: Contract securing indemnity from an absconding debtor pursued and overtaken on Sunday. Hooper v. Edwards, 18 Ala. 280. Repairing railroad tracks. Yonoski v. State, 79 Ind. 393, 41 Am. Rep. 614. Bail bond. Hammons v. State, 59 Ala. 164, 31 Am. Rep. 13. Repairing defect in highway. Flagg v. Inhabitants, supra. Shoeing horses used in carrying mail. Nelson v. State, 25 Tex. App. 599, 8 S. W. 927. Loading vessel where there is danger of navigation closing. McGatrick v. Wason, 4 Ohio St. 566. Pumping oil well; whether a work of necessity is a question of fact. Commonwealth v. Gillespie, 146 Pa. 546, 23 Atl. 393. Transportation of cattle by a railroad company, so that it cannot excuse itself for delay on the ground that the delay was on Sunday. Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415. Riding for exercise. Sullivan v. Railroad Co., 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427. Telegram from husband to wife explaining absence. Burnett v. Telegraph Co., 39 Mo. App. 599. Telegram to physician. W. U. Tel. Co. v. Griffin, 1 Ind. App. 46, 27 N. E. 113. Telegram announcing death of father. W. U. Tel. Co. v. Wilson, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23. Transaction of business by benefit association. Pepin v. Société, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626. The following have been held not within the exception: Note given to procure discharge of person arrested on charge of bastardy. Shippy v. Eastwood, 9 Ala. 198. Telegram respecting ordinary business affairs. W. U. Tel. Co. v. Yopst (Ind.) 11 N. E. 16. Gathering a crop. Com. v. White, 190 Mass. 578, 77 N. E. 636. Publication and sale of newspaper. HANDY v. ST. PAUL GLOBE PUB. CO., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695, Throckmorton Cas. Contracts, 227; Commonwealth v. Matthews, 12 Pa. Co. Ct. R. 149, 22 Pittsb. Leg. J. (N. S.) 309; Id., 152 Pa. 166, 25 Atl. 548, 18 L. R. A. 761. Ordinary sales or deliveries of ice or fresh meat. State v. James, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277; Arnheiter v. State, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392. Shaving and cutting or dressing hair by a barber. Phillips v. Innes, 4 Clark & F. 234; State v. Schuler (Ohio) 23 Wkly. Law Bul. 450; State v. Sopher, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468, 95 Am. St. Rep. 845. But see, contra, Ungericht v. State, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419; Stone v. Graves, 145 Mass. 353, 13 N. E. 906. Sale of meat by butcher. Tobacco is not within exception allowing sale of "drugs or medicines, provisions, or other articles of immediate necessity." State v. Ohmer, 34 Mo. App. 115. *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

work may be done on Sunday to save it. If, however, the work is only to prevent loss on a secular day, as where a mill wheel is cleaned on Sunday because to do so on another day will make it necessary to shut down and stop work for the purpose, it is not a work of necessity.[57] Nor is it sufficient to make a work one of necessity that it is profitable to those engaged in it and that it serves the convenience or tastes or wishes of the public generally.[58] Any act connected with religious worship,[59] or for the relief of suffering or distress,[60] is an act of charity, and may be performed on Sunday.

Same—Incomplete Transactions

The fact that negotiations are carried on, and the terms of a contract agreed upon, on Sunday, where the contract is not really made until a week day, does not render the contract illegal.[61] A promissory note, for instance, or a deed, though written and signed on Sunday, is valid if delivered on Monday, since it does not take effect until delivery;[62] and a sale of goods, though the negotiations

[57] McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119. And see, to the same effect, Hamilton v. Austin, 62 N. H. 575. Contra, Hennersdorf v. State, 25 Tex. App. 597, 8 S. W. 926, 8 Am. St. Rep. 448. *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

[58] HANDY v. ST. PAUL GLOBE PUB. CO., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695, Throckmorton Cas. Contracts, 227 (publishing newspaper). *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

[59] Church subscriptions made on Sunday are enforceable, see Allen v. Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Bryan v. Watson, 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63; Dale v. Knepp, 98 Pa. 389, 38 Am. Rep. 165, note, 42 Am. Rep. 624; Hodges v. Nalty, 113 Wis. 567, 89 N. W. 535. But see Catlett v. Trustees, 62 Ind. 365, 30 Am. Rep. 197. Where a carriage is hired on Sunday, the contract is not made legal "because the hirer did a kind act by conveying a young lady home who had been 'to meeting' during the day." Tillock v. Webb, 56 Me. 100. *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

[60] Buck v. City of Biddeford, 82 Me. 433, 19 Atl. 912. *See "Sunday," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 14–20.*

[61] Taylor v. Young, 61 Wis. 314, 21 N. W. 408; McKinnis v. Estes, 81 Iowa, 749, 46 N. W. 987; Tuckerman v. Hinkey, 9 Allen (Mass.) 452; Dickinson v. Richmond, 97 Mass. 45; Love v. Wells, 25 Ind. 503, 87 Am. Dec. 375; Uhler v. Applegate, 26 Pa. 140; Beitenman's Appeal, 53 Pa. 183; Meriwether v. Smith, 44 Ga. 541; Bryant v. Booze, 55 Ga. 438; Tyler v. Waddington, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Merrill v. Downs, 41 N. H. 72; Stackpole v. Symonds, 23 N. H. 229; Moseley v. Vanhooser, 6 Lea (Tenn.) 286, 40 Am. Rep. 37; Butler v. Lee, 11 Ala. 885, 46 Am. Dec. 230. That bill of sale is made on Sunday, in pursuance of sale made on previous day, does not invalidate sale. Foster v. Wooten, 67 Miss. 540, 7 South. 501. But see Hanchett v. Jordan, 43 Minn. 149, 45 N. W. 617. *See "Sunday," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 35.*

[62] King v. Fleming, 72 Ill. 21, 22 Am. Rep. 131; Bell v. Mahin, 69 Iowa,

are on Sunday, is valid if the goods are not set apart and delivered until Monday.[63]

Same—Ratification

Whether a contract made on Sunday is capable of ratification is a question on which there is much conflict of authority. Upon principle, it seems that the contract, being void in its inception, is incapable of ratification, and many cases so hold.[64] There is a tendency, however, to avoid the hardship resulting from the invalidity of such contracts, and many cases declare that such contracts are capable of ratification.[65] Where the contract is one of sale or exchange accompanied by actual delivery, there is authority to the effect that the property does not pass, and that the seller may maintain replevin[66] or trover;[67] in which case it seems

408, 29 N. W. 331; Hill v. Dunham, 7 Gray (Mass.) 543; Stacey v. Kemp, 97 Mass. 166; Lovejoy v. Whipple, 18 Vt. 379; 46 Am. Dec. 157; Hilton v. Houghton, 35 Me. 143; Gibbs & Sterrett Mfg. Co. v. Brucker, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534; Schwab v. Rigby, 38 Minn. 395, 38 N. W. 101; Dohoney v. Dohoney, 7 Bush (Ky.) 217; Beman v. Wessels, 53 Mich. 549, 19 N. W. 179; Wilson v. Winter (C. C.) 6 Fed. 16. So, where one of two partners executes an assignment on Sunday, but the other partner executes and delivers it on a secular day, the instrument is valid. Farwell v. Webster, 71 Wis. 485, 37 N. W. 437. *See "Sunday," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 35.*

[63] Rosenblatt v. Townsley, 73 Mo. 536; Banks v. Werts, 13 Ind. 203. *See "Sunday," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 35.*

[64] Day v. McAllister, 15 Gray (Mass.) 433; Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; Winfield v. Dodge, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; Tillock v. Webb, 56 Me. 100; Plaisted v. Palmer, 63 Me. 576; Kounts v. Price, 40 Miss. 341; Grant v. McGrath, 56 Conn. 333, 15 Atl. 370; Vins v. Beatty, 61 Wis. 645, 21 N. W. 787; Riddle v. Keller, 61 N. J. Eq. 513, 48 Atl. 818; Acme Electrical, etc., Co. v. Van Derbeck, 127 Mich. 341, 86 N. W. 786, 89 Am. St. Rep. 476; Tennent-Stribling Shoe Co. v. Roper, 94 Fed. 739, 36 C. C. A. 455. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

[65] Russell v. Murdock, 79 Iowa, 101, 44 N. W. 237, 18 Am. St. Rep. 348; Kuhns v. Gates, 92 Ind. 66; Adams v. Gay, 19 Vt. 358; Parker v. Pitts, 73 Ind. 597, 38 Am. Rep. 155; Banks v. Werts, 13 Ind. 203; Gwinn v. Simes, 61 Mo. 335; Wilson v. Milligan, 75 Mo. 41; Campbell v. Young, 9 Bush (Ky.) 245; Williamson v. Brandenberg, 6 Ind. App. 97, 32 N. E. 1022; Sumner v. Jones, 24 Vt. 317; Flinn v. St. John, 51 Vt. 334; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771; Van Hoven v. Irish (C. C.) 10 Fed. 13, 3 McCrary, 443; Cook v. Forker, 193 Pa. 461, 44 Atl. 560, 74 Am. St. Rep. 699. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

[66] Tucker v. Mowray, 12 Mich. 378; Winfield v. Dodge, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476. See, also, Magee v. Scott, 9 Cush. (Mass.) 148, 55

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[67] Ladd v. Rogers, 11 Allen (Mass.) 209. See, also, Myers v. Meinrath, 101 Mass. 366, 369, 3 Am. Rep. 368; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Cranson v. Goss, 107 Mass. 439, 441, 9 Am. Rep. 45. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

that a sufficient consideration for a new promise to pay may be found in the consent of the seller to the transfer of the property at the time of such promise; the liability of the promisor resting, however, upon a new contract, and not upon the ratification of the original contract.[68] So, if a sale is made on Sunday, but the goods are not delivered until a week day, the buyer is liable, not upon the original promise, but upon an implied promise to pay for the goods.[69] A contract for the performance on Sunday of work forbidden by law may not be ratified, because the very object of the contract is a violation of law.[70] A contract made on a previous day cannot be rescinded on Sunday.[71]

Usury

At common law a man could contract for and recover any amount of interest for a loan of money that the borrower might be willing to give; but, to protect persons in necessity against unconscionable exactions, usury laws have been enacted in most of the states, prescribing a legal rate of interest.

In some states the contract in which usury is charged is de-

Am. Dec. 49. Contra, Smith v. Bean, 15 N. H. 577, 578; Kinney v. McDermott, 55 Iowa, 674, 8 N. W. 656, 39 Am. Rep. 191. See, also, Simpson v. Nichols, 3 M. & W. 244, as corrected in 5 M. & W. 702 (questioning Williams v. Paul, 6 Bing. 653). *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

[68] Winfield v. Dodge, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; Haacke v. Knights of Liberty, 76 Md. 429, 25 Atl. 422; Brewster v. Banta, 66 N. J. Law, 367, 49 Atl. 718. An action may be maintained on a new promise. Williams v. Paul, 6 Bing. 653; Harrison v. Colton, 31 Iowa, 16; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605. See Winchell v. Cary, 115 Mass. 560, 15 Am. Rep. 151. Contra, Bontelle v. Melendy, 19 N. H. 196, 49 Am. Dec. 152; Kountz v. Price, 40 Miss. 341. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

[69] Bradley v. Rea, 14 Allen (Mass.) 20: Id., 103 Mass. 188, 4 Am. Rep. 524; Hopkins v. Stefan, 77 Wis. 45, 45 N. W. 676; Flynn v. Columbus Club, 21 R. I. 534, 45 Atl. 551; Bollin v. Hooper, 86 Mich. 287, 86 N. W. 795. The delivery must be accompanied by circumstances showing new contract. Aspell v. Hosbein, 98 Mich. 117, 57 N. W. 27. Defendant, who was indebted to plaintiff, agreed on Sunday to furnish a laborer on Monday to help plaintiff's son thresh, on plaintiff's account, which he did, and the son paid plaintiff a sum, which the latter placed to defendant's credit. Held, that the transaction on Monday did not show the elements of a contract without relying on the Sunday transaction, and hence was not sufficient to take the account out of the statute of limitations. Pillen v. Erickson, 125 Mich. 68, 83 N. W. 1023. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

[70] HANDY v. ST. PAUL GLOBE PUB. CO., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695, Throckmorton Cas. Contracts, 227. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

[71] Benedict v. Batchelder, 24 Mich. 425, 9 Am. Rep. 130. *See "Sunday," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 46.*

clared void. In many states the contract is not void, but the entire interest is forfeited. In other states only the excess of interest charged is forfeited; the legal amount is nevertheless recoverable.

Four requisites are necessary to constitute an usurious transaction: (1) A loan or forbearance of money; (2) An understanding that the money lent is to be returned; (3) The payment of, or agreement to pay, a greater rate of interest than is allowed by law; (4) A corrupt intent to take more than the legal rate for the use of the sum loaned.[72]

Same—Loan of Money

In the first place, there must be a lending and borrowing of money. If it is so understood by the parties, no shifting or contrivance for the purpose of disguising the real nature of the transaction can avail to evade the statute; and, on the other hand, if it was not a borrowing and lending, it cannot be brought within the statute.[73] The parties to a contract, for instance, may agree on a sum as stipulated damages in case of breach, and it may be recovered, though it exceeds the legal interest on the value of property which should have been paid.[74] So, also, on a loan of chattels, the agreed com-

[72] Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; Balfour v. Davis, 14 Or. 47, 12 Pac. 89. *See "Usury," Dec. Dig. (Key-No.) §§ 1, 11–15; Cent. Dig. §§ 1, 23–29.*

[73] Tyson v. Rickard, 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; Price v. Campbell, 2 Call (Va.) 110, 1 Am. Dec. 535; Ferguson v. Sutphen, 3 Gilman (Ill.) 547; Osborn v. McCowen, 25 Ill. 218; Struthers v. Drexel, 122 U. S. 487, 7 Sup. Ct. 1293, 30 L. Ed. 1216; Gaither v. Clarke, 67 Md. 18, 8 Atl. 740; Hartranft v. Uhlinger, 115 Pa. 270, 8 Atl. 244; Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265; Pope v. Marshall, 78 Ga. 635, 4 S. E. 116; Drury v. Wolfe, 34 Ill. App. 23; Id., 134 Ill. 294, 25 N. E. 626. Money paid above the legal rate for the forbearance of an existing debt is usury. Hathaway v. Hagan, 59 Vt. 75, 8 Atl. 678. Charging "banker's commission." Bowdoin v. Hammond, 79 Md. 173, 28 Atl. 769. An agreement by which a party lends bonds and the borrower agrees to pay to the owner the interest paid by the government, and 6 per cent. in addition, is not a contract for the loan of money. Marshall v. Rice, 85 Tenn. 502, 3 S. W. 177. Loans by building and loan association. Jackson v. Cassidy, 68 Tex. 282, 4 S. W. 541; Tilley v. Association (C. C.) 52 Fed. 618; Succession of Latchford, 42 La. Ann. 529, 7 South. 628; Hensel v. Association, 85 Tex. 215, 20 S. W. 116; International Bldg. & Loan Ass'n v. Abbott, 85 Tex. 220, 20 S. W. 118; Sullivan v. Association, 70 Miss. 94, 12 South. 590; Reeve v. Association, 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129; Iowa Savings & Loan Ass'n v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197; Washington Nat. Building, Loan & Investment Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793. *See "Usury," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 25.*

[74] Tardeveau v. Smith's Ex'r, Hardin (Ky.) 173, 3 Am. Dec. 727; Black-

pensation may be recovered, though it exceeds what would be the legal rate of interest on the value of the chattel.[75] In neither of these cases is there a loan or forbearance of money.[76] As already said, however, the contract must be made bona fide, and not as a cover for a loan.[77]

A negotiable note which has been executed and delivered is treated as a chattel, and it is not usury for a third person to buy it from the holder at a discount greater than the legal rate of interest.[78] An exception is made to this rule in some jurisdictions if the transferror indorses the note and thus makes himself conditionally liable for its payment;[79] but on principle and by the weight of authority such indorsement is regarded as a warranty of title and the transaction

burn v. Hayes, 59 Ark. 366, 27 S. W. 240. *See "Usury," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 25.*

[75] Hall v. Haggart, 17 Wend. (N. Y.) 280; Bull v. Rice, 5 N. Y. 315. *See "Usury," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 25.*

[76] See, also, Truby v. Mosgrove, 118 Pa. 89, 11 Atl. 806, 4 Am. St. Rep. 575; Appeal of Trine (Pa.) 13 Atl. 765; Union Cent. Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 231, 53 L. R. A. 462, 81 Am. St. Rep. 644. If a person sells chattels or land on credit, the fact that he charged a larger sum than he would have charged if he had sold for cash does not render the transaction usurious. Bull v. Rice, 5 N. Y. 315; Brooks v. Avery, 4 N. Y. 225; Gilmore v. Ferguson, 28 Iowa, 220; Swayne v. Riddle, 37 W. Va. 291, 16 S. E. 512; Brown v. Gardner, 4 Lea (Tenn.) 145; Graeme v. Adams, 23 Grat. (Va.) 225, 14 Am. Rep. 130; Wheeler v. Marchbanks, 32 S. C. 594, 10 S. E. 1011; Bass v. Patterson, 68 Miss. 310, 8 South. 849, 24 Am. St. Rep. 279. Contra, Fisher v. Hoover, 3 Tex. Civ. App. 81, 21 S. W. 930. Where on a purchase of land the vendee agrees to pay, as part of the price, on deferred payments in excess of the legal rate, the contract is not usurious. Askin v. Lebus (Ky.) 4 S. W. 305; Reger v. O'Neal, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427; Dykes v. Bottoms, 101 Ala. 390, 13 South. 582. For other cases in which it has been held that the relation of borrower and lender did not exist, see Appeal of Donehoo (Pa.) 15 Atl. 924; Niebuhr v. Schreyer (Com. Pl.) 13 N. Y. Supp. 809; McComb v. Association, 134 N. Y. 598, 31 N. E. 613; Duval v. Neal, 70 Miss. 288, 12 South. 145; Eddy's Ex'r v. Northup (Ky.) 23 S. W. 353. Sale or loan. Ellenbogen v. Griffey, 55 Ark. 268, 18 S. W. 126. *See "Usury," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 25.*

[77] Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833. *See "Usury," Dec. Dig. (Key-No.) § 13; Cent. Dig. § 25.*

[78] Lloyd v. Keach, 2 Conn. 175, 7 Am. Dec. 256; Nichols v. Fearson, 7 Pet. 103, 8 L. Ed. 623; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Cram v. Hendricks, 7 Wend. (N. Y.) 569; Jackson v. Travis, 42 Minn. 438, 44 N. W. 316; Holmes v. Bank, 53 Minn. 350, 55 N. W. 555; Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Chase Nat. Bank v. Faurot, 72 Hun, 373, 25 N. Y. Supp. 447; Rodecker v. Littauer, 59 Fed. 857, 8 C. C. A. 320. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

[79] Bank of Radford v. Kirby, 100 Va. 498, 42 S. E. 303; Sedbury v. Duffy, 158 N. C. 432, 74 S. E. 355. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

as a sale rather than a loan.[80] If the note was originally made for accommodation, and the first person giving value for it takes it at a rate of discount greater than the legal rate and with knowledge that it is accommodation paper, this constitutes usury, for it is a mere loan, and not the sale of a subsisting instrument;[81] and some courts have held such transactions usurious, even when the transferee of the note takes it without knowledge of its accommodation character;[82] but by the better opinion this is not usury, for there is no intention to lend, but only an intention to buy an instrument believed to be already valid and subsisting.[83]

The sale below par of the bonds of a corporation bearing the highest legal rate of interest is in reality a borrowing of money by the corporation at a higher rate than that prescribed by law, and in the absence of a special statute relating to corporations such transactions have usually been held usurious.[84] By statutes in some states, however, corporations are given the power to borrow money by the sale of bonds at a rate of interest higher than the legal rate prescribed for private persons;[85] and in other jurisdictions it is held that such sales are not usurious because by common commercial custom corporate bonds are regarded as chattels and their issue to a purchaser is treated as a sale of a subsisting security rather than a borrowing of money.[86]

Same—Principal Absolutely Repayable

A loan being essential to usury, the contract must contemplate the absolute repayment of the principal. Thus, where a loan is

[80] Becker's Investment Agency v. Rea, 63 Minn. 459, 65 N. W. 928 (stating different views); Durant v. Banta, 27 N. J. Law, 624. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

[81] Richardson v. Scobee, 10 B. Mon. (Ky.) 12; Newell v. Doty, 33 N. Y. 83. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

[82] Sylvester v. Swan, 5 Allen (Mass.) 134, 81 Am. Dec. 734; Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

[83] Dickerman v. Day, 31 Iowa, 444, 7 Am. Rep. 156; Sherman v. Blackman, 24 Ill. 345; Law's Ex'rs v. Sutherland, 5 Grat. (Va.) 357; Holmes v. State Bank of Duluth, 33 Minn. 350, 55 N. W. 555. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

[84] Danville v. Sutherlin, 20 Grat. (Va.) 555; Geo. N. Fletcher & Sons v. Alpena Circuit Judge, 136 Mich. 511, 99 N. W. 748; Houghteling v. Lumber Co., 165 Mich. 498, 131 N. W. 109, 35 L. R. A. (N. S.) 1106. *See "Usury," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 57, 58, 62.*

[85] Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Clearwater County State Bank v. Bagley-Ogema Telephone Co., 116 Minn. 4, 133 N. W. 91, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913A, 622. *See "Usury," Dec. Dig. (Key-No.) §§ 25, 26; Cent. Dig. §§ 55–62.*

[86] Memphis v. Bethel (Tenn.) 17 S. W. 191; Griffith v. Burden, 35 Iowa, 143. *See "Usury," Dec. Dig. (Key-No.) §§ 25, 26; Cent. Dig. §§ 55–62.*

made, to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty which hazards both principal and interest, the contract is not usurious; but where the interest, only, is hazarded, it is usury.[87]

Same—Contract for More Than Legal Rate of Interest

The interest paid or agreed to be paid must be at a rate higher than the legal rate. Thus, if a person agrees to pay a specific sum, exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury, since by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty.[88]

As to whether it is usury to charge compound interest—that is, interest upon overdue interest—the decisions are conflicting, but according to the weight of authority it is not so regarded; but interest cannot be charged on interest not due.[89] It is not usury to provide

[87] Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; Truby v. Mosgrove, 118 Pa. 89, 11 Atl. 806, 4 Am. St. Rep. 575; Thorndike v. Stone, 11 Pick. (Mass.) 183; Wilson v. Kilburn, 1 J. J. Marsh. (Ky.) 494; Spencer v. Tilden, 5 Cow. (N. Y.) 144; Heist v. Blaisdell, 198 Pa. 377, 48 Atl. 259. *See "Usury," Dec. Dig. (Key-No.) §§ 37–41; Cent. Dig. §§ 92–95.*

[88] Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; BLAKE v. YOUNT, 42 Wash. 101, 84 Pac. 625, 114 Am. St. Rep. 106, 7 Ann. Cas. 487, Throckmorton Cas. Contracts, 230; Gambril v. Doe, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; Fisher v. Anderson, 25 Iowa, 28, 95 Am. Dec. 761; Righter v. Warehouse Co., 99 Pa. 289; McNairy v. Bell, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454; Walker v. Abt, 83 Ill. 226; Ramsey v. Morrison, 39 N. J. Law, 591; Conrad v. Gibbon, 29 Iowa, 120; Hackenberry v. Shaw, 11 Ind. 392; Rogers v. Sample, 33 Miss. 310, 69 Am. Dec. 349. But see Carroll Co. Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Connecticut Mut. Life Ins. Co. v. Westerhoff, 58 Neb. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101; Linton v. Insurance Co., 104 Fed. 584, 44 C. C. A. 54. *See "Usury," Dec. Dig. (Key-No.) §§ 37–41; Cent. Dig. §§ 92–95.*

[89] BLAKE v. YOUNT, 42 Wash. 101, 84 Pac. 625, 114 Am. St. Rep. 106, 7 Ann. Cas. 487, Throckmorton Cas. Contracts, 230; Stewart v. Petree, 55 N. Y. 621, 14 Am. Rep. 352; Culver v. Bigelow, 43 Vt. 249; Quimby v. Cook, 10 Allen (Mass.) 32; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Austin v. Bacon, 28 Wis. 416; Taylor v. Hiestand, 46 Ohio St. 345, 20 N. E. 345; Gilmore v. Bissell, 124 Ill. 488, 16 N. E. 925; Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Keiser v. Decker, 29 Neb. 92, 45 N. W. 272: Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Hale v. Hale, 1 Cold. (Tenn.) 233, 78 Am. Dec. 490; Ginn v. Security Co., 92 Ala. 135, 8 South. 388; Brown v. Bank, 86 Iowa, 527, 53 N. W. 410. See, for distinctions, Cox v. Brookshire, 76 N. C. 314; Simpson v. Evans, 44 Minn. 419, 46 N. W. 908; Kimbrough v. Lukins, 70 Ind. 373; Drury v. Wolfe, 134 Ill. 294, 25 N. E. 626; Leonard v. Patton, 106 Ill. 99; Mathews v. Toogood, 23 Neb. 536, 37 N. W. 265. 8 Am. St. Rep. 131; Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Palm v. Fancher, 93 Miss. 785, 48 South. 818, 33 L. R. A. (N. S.) 295. In some jurisdictions, however, the courts have refused to allow recovery of interest on interest, on the ground that it sa-

for payment of an attorney's fee if the debt has to be collected by suit;[90] nor to require payment in advance of the highest legal rate;[91] nor, under some circumstances, to pay a broker a commission, or for expenses, for procuring the loan,[92] provided, as in other

vored of usury, and was contrary to the policy of the law. See Bowman v. Neely, 151 Ill. 37, 37 N. E. 840; Wilcox v. Howland, 23 Pick. (Mass.) 167; Henry v. Flagg, 13 Metc. (Mass.) 64; Cox v. Smith, 1 Nev. 161, 90 Am. Dec. 476; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99. *See "Usury," Dec. Dig. (Key-No.) § 49; Cent. Dig. §§ 103–106.*

[90] Weatherby v. Smith, 30 Iowa, 131, 6 Am. Rep. 663; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; Williams v. Flowers, 90 Ala. 136, 7 South. 439, 24 Am. St. Rep. 772; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Smith v. Silvers, 32 Ind. 321; First Nat. Bank v. Canatsey, 34 Ind. 149; National Bank of Athens v. Danforth, 80 Ga. 55, 7 S. E. 546; Shelton v. Aultman & Taylor Co., 82 Ala. 315, 8 South. 232; Fowler v. Trust Co., 141 U. S. 411, 12 Sup. Ct. 8, 35 L. Ed. 794. Otherwise by statute in some states. *See "Usury," Dec. Dig. (Key-No.) § 62; Cent. Dig. § 135.*

[91] Parker v. Cousins, 2 Grat. (Va.) 372, 44 Am. Dec. 388; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Meyer v. Muscatine, 1 Wall. 384, 17 L. Ed. 564; Vahlberg v. Keaton, 51 Ark. 534, 11 S. W. 878, 4 L. R. A. 462, 14 Am. St. Rep. 73; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Fowler v. Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; English v. Smock, 34 Ind. 115, 7 Am. Rep. 215; Newell v. Bank, 12 Bush (Ky.) 57; Rose v. Munford, 36 Neb. 148, 54 N. W. 129; Hawks v. Weaver, 46 Barb. (N. Y.) 164; Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710. *See "Usury," Dec. Dig. (Key-No.) §§ 45, 46; Cent. Dig. §§ 98, 99.*

[92] Suydam v. Westfall, 4 Hill (N. Y.) 211; Matthews v. Coe, 70 N. Y. 239, 26 Am. Rep. 583; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Boardman v. Taylor, 66 Ga. 638; Haldeman v. Insurance Co., 120 Ill. 390, 11 N. E. 526; New England Mortgage Security Co. v. Gay (C. C.) 33 Fed. 636; Thomas v. Miller, 39 Minn. 339, 40 N. W. 358; Baird v. Millwood, 51 Ark. 548, 11 S. W. 881; Cockle v. Flack, 93 U. S. 344, 33 L. Ed. 949; Pass v. Security Co., 66 Miss. 365, 6 South. 239; Hughes v. Griswold, 82 Ga. 299, 9 S. E. 1092; Hall v. Daggett, 6 Cow. (N. Y.) 653; Nourse v. Prime, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Ginn v. Security Co., 92 Ala. 135, 8 South. 388; White v. Dwyer, 31 N. J. Eq. 40; Davis v. Sloman, 27 Neb. 877, 44 N. W. 41; Weems v. Jones, 86 Ga. 760, 13 S. E. 89. Even the lender, it has been held, may charge for extra services and expenses, for, to constitute usury, the charge must be for the loan or forbearance. Atlanta Mining & Rolling Mill Co. v. Gwyer, 48 Ga. 9; Morton v. Thurber, 85 N. Y. 550; Ammondson v. Ryan, 111 Ill. 506; De Forest v. Strong, 8 Conn. 513; Dayton v. Moore, 30 N. J. Eq. 543; Daley v. Investment Co., 43 Minn. 517, 45 N. W. 1100; Swanstrom v. Balstad, 51 Minn. 276, 53 N. W. 648; Iowa Savings & Loan Ass'n v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197. But see Jackson v. May, 28 Ill. App. 305. But if the lender exacts a bonus in addition to interest at legal rate, it is usury. Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec 283; Hewitt v. Dement, 57 Ill. 500; Walter v. Foutz, 52 Md. 147; Harris v. Wicks, 28 Wis. 198; Stark v. Sperry, 6 Lea (Tenn.) 411, 40 Am. Rep. 47; Rowland v. Bull, 5 B. Mon. (Ky.) 146. But exacting bonus or commission

cases, it is not a cover for a usurious transaction.[93] It has been held that it is usury to delay payment of the money loaned, and exact interest for the full time.[94]

Same—Unlawful Intent

There must be an intention to charge and pay the illegal rate.[95] Ignorance of the law will not protect a party from the penalties of usury where it is committed; but where there was no intention to evade the law, and the facts which would otherwise constitute usury can be shown to be the result of mistake or accident, no penalty

by agent as condition of making loan at legal interest for his principal, without knowledge or consent of the latter, does not constitute usury in the principal. Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; New England Mortgage Security Co. v. Townes (Miss.) 1 South. 242; Acheson v. Chase, 28 Minn. 211, 9 N. W. 734; Ballinger v. Bourland, 87 Ill. 513, 29 Am. Rep. 69; Boylston v. Bain, 90 Ill. 283; Williams v. Bryan, 68 Tex. 593, 5 S. W. 401; Lane v. Insurance Co., 46 N. J. Eq. 316, 19 Atl. 617, 618; May v. Flint, 54 Ark. 573, 16 S. W. 575; Boardman v. Taylor, 66 Ga. 638; Ammerman v. Ross, 84 Iowa, 359, 51 N. W. 6; Dryfus v. Burnes (C. C.) 53 Fed. 410. Not even where agent is general agent of lender to loan money, if illegal exaction is solely for agent's benefit, and without knowledge or sanction of lender, and he in no way ratifies it. Stein v. Swensen, 44 Minn. 218, 46 N. W. 360. But see Kemmitt v. Adamson, 44 Minn. 121, 46 N. W. 327. If the principal knows of exaction, contract is usurious. Banks v. Flint, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L. R. A. 459; Bliven v. Lydecker, 130 N. Y. 102, 28 N. E. 625; Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69. Payment to attorney for examining title. Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47. Bonus paid by borrower to his own agent for procuring loan is no part of sum paid for loan. Dryfus v. Burnes (C. C.) 53 Fed. 410; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; Grieser v. Hall, 56 Minn. 155, 57 N. W. 462. But see, contra, where lender knew of payment. Brown v. Brown, 38 S. C. 173, 17 S. E. 452. And see Holt v. Kirby, 57 Ark. 251, 21 S. W. 432. *See "Usury," Dec. Dig. (Key-No.) §§ 55–57; Cent. Dig. §§ 119–129.*

[93] Sherwood v. Roundtree (C. C.) 32 Fed. 113; Pfenning v. Scholer, 43 N. J. Eq. 15, 10 Atl. 833; Sanford v. Kane, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. Rep. 602. *See "Usury," Dec. Dig. (Key-No.) §§ 55–57; Cent. Dig. §§ 119–129.*

[94] Barr's Adm'x v. African M. E. Church (N. J. Eq.) 10 Atl. 287. Cf. Daley v. Investment Co., 43 Minn. 517, 45 N. W. 1100; Rose v. Munford, 36 Neb. 148, 54 N. W. 129. *See "Usury," Dec. Dig. (Key-No.) § 43; Cent. Dig. § 97.*

[95] Tyson v. Rickard, 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; Bevier v. Covell, 87 N. Y. 50; Gibson v. Stearns, 3 N. H. 185; Smythe v. Allen, 67 Miss. 146, 6 South. 627; Bearce v. Bartsow, 9 Mass. 45, 6 Am. Dec. 25; Brown v. Bank, 89 Iowa, 527, 53 N. W. 410; Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; Price v. Campbell, 2 Call (Va.) 110, 1 Am. Dec. 535; McFarland v. Bank, 4 Ark. 44, 37 Am. Dec. 761; Henry v. Sansom, 2 Tex. Civ. App. 150, 21 S. W. 69; McElfatrick v. Hicks, 21 Pa. 402. A conscious purpose to commit usury is not necessary. "If they intended what amounts to usury, then in legal effect they intended usury." In re Fishel, Nessler & Co. (D. C.) 192 Fed. 412, and note. *See "Usury," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 23, 24, 146.*

attaches.[96] Thus, if a contract reserves excessive interest merely because of a mistaken calculation, it is not for that reason usurious.

A note given between the original parties for a balance due on previous notes which were usurious, or in renewal of usurious notes, is itself tainted with usury;[97] but a renewal note given to a subsequent bona fide holder of the original note is not usurious,[98] nor is a note given to a third party for money to be applied in payment of other notes which were usurious.[99]

Same—Effect of National Banking Act

By the national banking act, national banks are authorized to exact interest at the rate permitted to individuals or to state banks of issue in the state in which they are located; and where no rate is fixed by state laws they may charge at the rate of seven per cent.[1] The act also provides that the penalty for the charging of usurious interest by a national bank shall be a forfeiture of the entire interest, and that if the interest has been paid twice the amount may be

[96] Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833. *See "Usury," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 23, 24, 146.*

[97] Cottrell v. Southwick, 71 Iowa, 50, 32 N. W. 22; Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567; McDonald v. Aufdengarten, 41 Neb. 40, 59 N. W. 762; Levey v. Allien, 72 Hun, 321, 25 N. Y. Supp. 352. If, however, a usurious contract is mutually abandoned by the parties, and the securities canceled or destroyed, so that they may not become the foundation of an action, and the borrower then makes a contract to pay the amount actually received by him, this last contract will not be tainted with the original usury. Sheldon v. Haxtun, 91 N. Y. 125; Levey v. Allien, supra; Porter v. Jefferies, 40 S. C. 92, 18 S. E. 229. *See "Usury," Dec. Dig. (Key-No.) §§ 66, 67; Cent. Dig. §§ 139–141.*

[98] Armstrong v. Middaugh, 74 Misc. Rep. 45, 133 N. Y. Supp. 647. *See "Usury," Dec. Dig. (Key-No.) §§ 66, 67; Cent. Dig. §§ 139–141.*

[99] Cottrell v. Southwick, 71 Iowa, 50, 32 N. W. 22; Vaught v. Rider, 83 Va. 659, 3 S. E. 293, 5 Am. St. Rep. 305; France v. Smith, 87 Iowa, 552, 54 N. W. 366. Contra, where the transaction is a mere cover for a usurious loan. Luckens v. Hazlett, 37 Minn. 441, 35 N. W. 265. *See "Usury," Dec. Dig. (Key-No.) §§ 66, 67; Cent. Dig. §§ 139–141.*

[1] Rev. St. U. S. (1872) §§ 5197, 5198 (Act June 3, 1864, c. 106, § 30, 13 Stat. 108 [U. S. Comp. St. 1901, p. 3493]); Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196. In New York, where by statute the exaction of usury by an individual makes a contract void, state banks and private banks and bankers have been put by statute upon the same basis as national banks and subject only to the same penalties. If, therefore, a note originally between individuals is void as to them because of usury, it is nevertheless valid and enforceable when discounted by a state or national bank before maturity and without notice of the usury. Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138. Contra, if the bank acquired the instrument with knowledge of the usury. Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591. *See "Banks and Banking," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1023–1053.*

recovered. This act governs all loans by national banks, to the exclusion of state laws, and such banks may not be subjected to any penalties for usury other than those prescribed by the act.[2]

Wagers and Gambling Transactions

A "wager" has been defined as a contract conditional upon an event in which the parties have no interest except that which they create by the wager;[3] but this attempts to limit the term to contracts not permitted by law, and is not broad enough. Parties may make a wager on a matter in which they are interested. It is more accurate to say that a wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event or fact, the consideration for the promise being either a present payment or transfer by the other party, or a promise to do so upon the event or fact being determined or ascertained in a particular way.[4] The term is often applied to contracts not permitted by law, as opposed to others which, though precisely similar in their nature, may be enforced, and this has resulted in some confusion.

A wager may be what we understand by a "bet"—that is, a purely gambling transaction—or it may be directed to commercial objects. A man who bets on the result of a horse race makes a wagering contract; but so does a man who takes out a policy of insurance, for he bets on the safety of the property insured, or on the duration of

[2] Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196. *See "Banks and Banking," Dec. Dig. (Key-No.) § 270; Cent. Dig. §§ 1023–1053.*

[3] Leake, Cont. 377. By the terms of a note, given in part payment of land, defendant promised to pay $900 if cotton should rise to 8 cents by a certain date, and, if not, to pay $500. It was held that the agreement was not a wager on the price of cotton, "for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product." Ferguson v. Coleman, 3 Rich. (S. C.) 99, 45 Am. Dec. 761. A contract by which a party purchases 50 bushels of "Bohemian oats" at $10 a bushel, and the seller agrees to sell for him the next year 100 bushels at $10 a bushel, has been held not to be a gambling contract. Shipley v. Reasoner, 80 Iowa, 548, 45 N. W. 1077; Matson v. Blossom, 50 Hun, 600, 2 N. Y. Supp. 551. Contra, Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281. Such contracts, however, are illegal, since they cannot be performed without defrauding some one. Hanks v. Brown, 79 Iowa, 560, 44 N. W. 811; Merrill v. Packer, 80 Iowa, 542, 45 N. W. 1076. Contra, Matson v. Blossom, supra. For similar contract, illegal because tending to defraud, see Hubbard v. Freiburger, 133 Mich. 139, 94 N. W. 727. *See "Gaming," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 1.*

[4] Anson, Cont. (4th Ed.) 173; Hampden v. Walsh, 1 Q. B. Div. 189. *See "Gaming," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 1.*

the life, as the case may be. In the latter case the contract may be valid, but it is nevertheless a wager.[5]

At common law in England, over a century ago, wagers on almost all subjects were enforceable. Gradually the courts, finding that frivolous and indecent matters were sometimes brought before them for decision, established a rule that a wager would not be enforced if it led to indecent evidence, or was calculated to injure or pain a third person, and in some cases general notions of public policy were introduced to the effect that any wager which tempted a man to offend against the law was illegal.[6]

Aside from these cases, wagers continued to be enforced in England, and have been enforced in many of our states.[7] In other states, the courts have held all wagering contracts on matters in which the parties have no interest illegal, as being contrary to public policy.[8]

[5] Anson, Cont. (4th Ed.) 174–176.

[6] See Gilbert v. Sykes, 16 East, 150; Hartley v. Rice, 10 East, 22; Good v. Elliott, 3 Term R. 693; Eltham v. Kingsman, 1 Barn. & Ald. 683; Atherford v. Beard, 2 Term R. 610; Evans v. Jones, 5 Mees. & W. 77; Ditchburn v. Goldsmith, 4 Camp. 152. And see Brogden v. Marriott, 3 Bing. N. C. 88; Ramloll v. Soojumnull, 6 Moore, P. C. 310; Bunn v. Riker, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; Rust v. Gott, 9 Cow. (N. Y.) 169, 18 Am. Dec. 497; Hill v. Kidd, 43 Cal. 615; Vischer v. Yates, 11 Johns. (N. Y.) 23. *See "Gaming," Dec. Dig. (Key-No.) §§ 1–5; Cent. Dig. §§ 1–15.*

[7] Campbell v. Richardson, 10 Johns. (N. Y.) 406; Good v. Elliott, 3 Term R. 693; Clendining v. Church, 3 Caines (N. Y.) 141; Winchester v. Nutter, 52 N. H. 507, 13 Am. Rep. 93; Dewees v. Miller, 5 Har. (Del.) 347; Stoddard v. Martin, 1 R. I. 1, 19 Am. Dec. 643; Buchanan v. Insurance Co., 6 Cow. (N. Y.) 318; Wheeler v. Spencer, 15 Conn. 28; Johnston v. Russell, 37 Cal. 670; Wroth v. Johnson, 4 Har. & McH. (Md.) 284; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576; Wootan v. Hasket, 1 Nott & McC. (S. C.) 180; Kirkland v. Randon, 8 Tex. 10, 58 Am. Dec. 94. Wager as to shape of earth, Hampden v. Walsh, 1 Q. B. Div. 189; as to weight of hog, Mulford v. Bowen, 9 N. J. Law, 315; as to result of past election in another state, Smith v. Smith, 21 Ill. 244, 74 Am. Dec. 100; as to time within which railroad would be completed, Beadles v. Bless, 27 Ill. 320, 81 Am. Dec. 231; Johnson v. Fall, 6 Cal. 359, 65 Am. Dec. 518. *See "Gaming," Dec. Dig. (Key-No.) §§ 1–5; Cent. Dig. §§ 1–15.*

[8] Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Amory v. Gilman, 2 Mass. 1; Love v. Harvey, 114 Mass. 80; Perkins v. Eaton, 3 N. H. 152; West v. Holmes, 26 Vt. 530; Winchester v. Nutter, 52 N. H. 507, 13 Am. Rep. 93; Wheeler v. Spencer, 15 Conn. 28; Lewis v. Littlefield, 15 Me. 233; Stoddard v. Martin, 1 R. I. 1, 19 Am. Dec. 643; Collamer v. Day, 2 Vt. 144; Edgell v. McLaughlin, 6 Whart. (Pa.) 176, 36 Am. Dec. 214; Thomas v. Cronise, 16 Ohio, 54; Lucas v. Harper, 24 Ohio St. 328; Bernard v. Taylor, 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; Rice v. Gist, 1 Strob. (S. C.) 82; Wilkinson v. Tousley, 16 Minn. 299

There are now, both in England [9] and in this country, statutes covering the subject. There is so much difference in the statutes of the different states that it would be impracticable to attempt to give them. It is sufficient to say that in almost all the states, if not in all, the statutes make all gambling contracts either void, or both illegal and void.

Same—Offer of Premium or Reward

Neither under the common law nor under the statutes against gaming, betting, and wagers is the bona fide offer of premiums or purses on horse races or other legitimate competitions illegal, and it is immaterial that the competitors are required to pay an entrance fee before they are allowed to compete, and that these fees go to make up in part the premium or purse offered.[10]

Same—Contracts of Insurance

At common law, in England, contracts of insurance, like other wagers, were valid though the assured had no interest whatever in the property or the life insured; [11] and the English doctrine, as we have seen, has been recognized in a few of our states.[12] In most of our states, however, the doctrine has been repudiated, and it has been held, independently of any statute, that contracts of insurance with a person who has no interest in the property or life are mere gambling transactions, and are void.[13] The subject is

(Gil. 263), 10 Am. Rep. 139; Eldred v. Malloy, 2 Colo. 320, 25 Am. Rep. 752; Pabst Brewing Co. v. Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275. *See "Gaming," Dec. Dig. (Key-No.) §§ 1–5; Cent. Dig. §§ 1–15.*

[9] Anson, Cont. (8th Ed.) 189 et seq. Some of the earlier English statutes have in this country been regarded as part of the common law. Emerson v. Townsend, 73 Md. 224, 20 Atl. 984. *See "Gaming," Dec. Dig. (Key-No.) §§ 1–5; Cent. Dig. §§ 1–15.*

[10] Porter v. Day, 71 Wis. 296, 37 N. W. 259. And see Harris v. White, 81 N. Y. 532; Misner v. Knapp, 13 Or. 135, 9 Pac. 65, 57 Am. Rep. 6; Delier v. Society, 57 Iowa, 481, 10 N. W. 872; Alvord v. Smith, 63 Ind. 58; People v. Fallon, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; Hankins v. Ottinger, 115 Cal. 454, 47 Pac. 254, 40 L. R. A. 76; Wilkinson v. Stitt, 173 Mass. 581, 56 N. E. 830. In some states the offer of such rewards or premiums is prohibited in certain cases. Bronson Agricultural & B. Ass'n v. Ramsdell, 24 Mich. 441. It is otherwise where the offer of a premium is a mere subterfuge to cover a bet; as where the owners of horses make up a purse, and put it in the hands of a third person to pay to the one of them whose horse shall win. Gibbons v. Gouverneur, 1 Denio (N. Y.) 170. *See "Gaming," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 16.*

[11] Kulen Kemp v. Vigne, 1 Term R. 304; Dean v. Dicker, 2 Strange, 1250. *See "Insurance," Dec. Dig. (Key-No.) § 119; Cent. Dig. § 165.*

[12] Clendining v. Church, 3 Caines (N. Y.) 141; Buchanan v. Insurance Co., 6 Cow. (N. Y.) 318; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576. *See "Insurance," Dec. Dig. (Key-No.) § 119; Cent. Dig. § 165.*

[13] Stevens v. Warren, 101 Mass. 564; Warnock v. Davis, 104 U. S. 775, 26

now very generally dealt with by statute both in England and with us, so that there is seldom any occasion to look to the common law. By these statutes, any contract of marine, fire, or life insurance is declared void unless the assured has an insurable interest.

The question as to what amounts to an insurable interest is one more peculiarly for a work on insurance, and it would be impracticable for us to go into it. In the case of marine or fire insurance it is sufficient to say that if a person has any interest in the vessel, cargo, or other property, legal or equitable, so that he would suffer a loss if it should be destroyed, he has an insurable interest.[14] In the case of life insurance it has been said that "all which it seems necessary to show in order to take the policy out of the objection of being a wager policy is that the insured has some interest in the life of the cestui que vie; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages supposed to depend on the life of another." [15]

Same—Futures

An agreement for the sale of stocks, grain, or any other commodity is a gambling contract where the parties do not intend an actual delivery, but agree that at the time fixed for delivery, they shall settle by one of them paying the other the difference between the price agreed upon and the market price at the time of delivery. This is a mere bet or speculation on the rise and fall of the price of the article, and is illegal, not only under the statutes, but in most states even independently of any statute.[16] The law on this subject was

L. Ed. 924; Amory v. Gilman, 2 Mass. 1; Loomis v. Insurance Co., 6 Gray (Mass.) 396; Bersch v. Insurance Co., 28 Ind. 64; Bevin v. Insurance Co., 23 Conn. 244; Sawyer v. Mayhew, 51 Me. 398; Sweeney v. Insurance Co., 20 Pa. 337; Fowler v. Insurance Co., 26 N. Y. 422; ante, p. 342. *See "Insurance," Dec. Dig. (Key-No.) § 119; Cent. Dig. § 165.*

[14] Vance on Insurance, 107 et seq.

[15] Loomis v. Insurance Co., 6 Gray (Mass.) 398; Vance on Insurance, 129 et seq. *See "Insurance," Dec. Dig. (Key-No.) § 119; Cent. Dig. § 165.*

[16] IN RE TAYLOR & CO.'S ESTATE, 192 Pa. 304, 43 Atl. 973, 73 Am. St. Rep. 812, Throckmorton Cas. Contracts, 233; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Burt v. Meyer, 71 Md. 467, 18 Atl. 796; Brua's Appeal, 55 Pa. 294; Kingsbury v. Kirwan, 77 N. Y. 612; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; White v. Barber, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243; Hatch v. Douglass, 48 Conn. 116, 40 Am. Rep. 154; Dunn v. Bell, 85 Tenn. 581, 4 S. W. 41; Pickering v. Cease, 79 Ill. 328; Flagg v. Gilpin, 17 R. I. 10, 19 Atl. 1084; Lawton

thus stated in a late Massachusetts case: "If, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices." [17]

v. Blitch, 83 Ga. 663, 10 S. E. 353; Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Wagner v. Hildebrand, 187 Pa. 136, 41 Atl. 34; Johnston v. Miller, 67 Ark. 172, 53 S. W. 1052; Counselman v. Reichart, 103 Iowa, 430, 72 N. W. 490; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302; Ponder v. Jerome Hill Cotton Co., 100 Fed. 373, 40 C. C. A. 416; Clews v. Jamieson, 96 Fed. 648, 38 C. C. A. 473; Morris v. Western Union Telegraph Co., 94 Me. 423, 47 Atl. 926; Atwater v. Manville, 106 Wis. 64, 81 N. W. 985; Rogers v. Marriott, 59 Neb. 759, 82 N. W. 21. And see cases cited post, pp. 430, 431, notes 55, 57. Such transactions are not regarded as contrary to public policy in England, but are held to be gaming and wagering transactions within the meaning of the statute prohibiting such transactions. Thacker v. Hardy, 4 Q. B. Div. 685. It has been held, however, that this class of contracts were not gaming contracts within the meaning of statutes avoiding instruments in the hands of bona fide holders if given on a gaming consideration. Shaw v. Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474; Third Nat. Bank v. Harrison (C. C.) 10 Fed. 243. But see, contra, Thacker v. Hardy, 4 Q. B. Div. 685; Cunningham v. Bank, 71 Ga. 400, 51 Am. Rep. 266; Grizewood v. Blane, 11 C. B. 526; Lyons v. Hodgen, 90 Ky. 280, 13 S. W. 1076. That they are wagers within the meaning of a statute, see McGrew v. Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771. *See "Gaming," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 22.*

[17] Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159. And see Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; Bailey & Graham v. Phillips (C. C.) 159 Fed. 535; Rodgers, McCabe & Co. v. Bell, 156

This intention must be common to both parties. If one of them intends a bona fide sale, and actual delivery if it shall be required, he may enforce the contract, though the other party may have intended a wager on future prices.[18] The fact that the seller has not the article sold at the time of the contract does not render the contract void. It is valid if an actual delivery is intended, though he is to buy the article in the market at the time of delivery, and though a margin may have been deposited as security.[19]

Lotteries

In England, and in most, if not all, of our states, lotteries are now prohibited by statute. A "lottery" has been defined as "a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise, or by some other name."[20]

N. C. 378, 72 S. E. 817. But if the circumstances show that the transaction was a speculation only, and that no delivery was intended, it is void, notwithstanding a rule of the exchange that actual delivery may be exacted. Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152. *See "Gaming," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 22.*

[18] Pixley v. Boynton, 79 Ill. 351; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Bangs v. Hornick (C. C.) 30 Fed. 97; Jones v. Shale, 34 Mo. App. 302; Scanlon v. Warren, 169 Ill. 142, 48 N. E. 410; Donovan v. Dalber, 124 Mich. 49, 82 N. W. 848. Otherwise by some statutes. Harvey v. Doty, 54 S. C. 382, 32 S. E. 501. So of the contract between broker and principal. If the broker is privy to the unlawful intention of the parties, his contract with his principal is illegal, and he cannot recover his commissions, etc.; but if he is not privy thereto, his contract is legal. Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 498, 13 Sup. Ct. 950, 37 L. Ed. 819; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; IN RE TAYLOR & CO.'S ESTATE, 192 Pa. 304, 43 Atl. 973, 73 Am. St. Rep. 812, Throckmorton Cas. Contracts, 233. *See "Gaming," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 22.*

[19] Richter v. Poe, 109 Md. 20, 71 Atl. 420, 22 L. R. A. (N. S.) 174; IN RE TAYLOR & CO.'S ESTATE, 192 Pa. 304, 43 Atl. 973, 73 Am. St. Rep. 812, Throckmorton Cas. Contracts, 233; Story v. Solomon, 71 N. Y. 420; Appleman v. Fisher, 34 Md. 540; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Gregory v. Wattowa, 58 Iowa, 711, 12 N. W. 726; Cole v. Milmine, 88 Ill. 349; Wall v. Schneider, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520; Wollcott v. Heath, 78 Ill. 433; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28. Parol evidence is always admissible to show what was the real intention. Clarke v. Foss, 7 Biss. 540, Fed. Cas. No. 2,852; Watte v. Wickersham, 27 Neb. 457, 43 N. W. 259; Gaw v. Bennett, 153 Pa. 247, 25 Atl. 1114, 34 Am. St. Rep. 699; Hentz v. Jewell (C. C.) 20 Fed. 592. *See "Gaming," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 22.*

[20] New York Penal Code, § 323. And see People v. Lovin, 179 N. Y. 164,

In an English case the proprietor of a journal had advertised a "missing word competition," the scheme of which was that persons should guess upon the word omitted in a published paragraph, accompanying their guess by a fee, the money so received to be distributed among the successful competitors. The proprietor, after receiving the money, refused to distribute it, and suit was brought against him by a successful competitor. It was held that the transaction was a lottery, as the distribution was to take place by chance, and that the action could not be maintained.[21] So guessing contests upon the number of votes to be cast at on election,[22] the number of persons to be admitted to a fair,[23] the number of beans in a jar,[24] or upon anything else where it is a mere matter of chance as to which competitor will submit the nearest correct estimate, have been held to be lotteries.[25]

A scheme or contest may constitute a lottery even though each person participating is to receive some consideration for the money paid by him.[26] A distribution, however, does not constitute a lot-

71 N. E. 753, 66 L. R. A. 601, 1 Ann. Cas. 165; Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092. *See "Lotteries," Dec. Dig. (Key-No.) §§ 3–8; Cent. Dig. §§ 3–8.*

[21] Barclay v. Pearson, [1893] 2 Ch. 154. And see, as to what constitutes a lottery, Jackson Steel Nail Co. v. Marks, 4 Ohio Civ. Ct. R. 343; Caminada v. Hulton, 64 Law T. 572; gift enterprises, State v. Bonell, 42 La. Ann. 1110, 8 South. 298, 10 L. R. A. 60, 21 Am. St. Rep. 413; Long v. State, 73 Md. 527, 21 Atl. 683, 12 L. R. A. 89, 25 Am. St. Rep. 606; Id., 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; merchant tailor clubs, State v. Moren, 48 Minn. 555, 51 N. W. 618; prizes to stimulate trade, Davenport v. City of Ottawa, 54 Kan. 711, 39 Pac. 708, 45 Am. St. Rep. 303; Lynch v. Rosenthal, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; State v. Investment Co., 64 Ohio St. 283, 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754. A law prohibiting the giving of trading stamps held violative of liberty guarantied by constitution, since transaction prohibited not a lottery. State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818. See, also, Ex parte McKenna, 126 Cal. 429, 58 Pac. 916. *See "Lotteries," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

[22] Waite v. Press Pub. Ass'n, 155 Fed. 58, 85 C. C. A. 576, 11 L. R. A. (N. S.) 609, 12 Ann. Cas. 319; Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1038, 106 Am. St. Rep. 586. And see 25 Op. Attys. Gen. 286. *See "Lotteries," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

[23] 25 Op. Attys. Gen. 286.

[24] Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171. *See "Lotteries," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

[25] People v. Lovin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601, 1 Ann. Cas. 165. *See "Lotteries," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

[26] State v. Nebraska Home Co., 66 Neb. 349, 92 N. W. 763, 60 L. R. A. 448, 103 Am. St. Rep. 706, 1 Ann. Cas. 88; People v. McPhee, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 503, 5 Ann. Cas. 835; Grant v. State, 54 Tex. Cr. R.

tery where no consideration is paid, directly or indirectly, for the right to participate.[27]

AGREEMENTS CONTRARY TO PUBLIC POLICY

154. Any agreement which is contrary to the policy of the law, or public policy, because of its mischievous nature or tendency, is illegal and void, though the acts contemplated may not be expressly prohibited either by the common law or by statute.

155. The test of public policy must be applied in each case as it arises, and therefore agreements which have been or may be declared contrary to public policy cannot be exactly classified. The most general are:

(a) Agreements tending to injure the public service.
(b) Agreements involving or tending to the corruption of private citizens with reference to public matters.
(c) Agreements tending to pervert or obstruct public justice.
(d) Agreements tending to encourage litigation.
(e) Agreements of immoral tendency.
(f) Gambling transactions.
(g) Agreements tending to induce fraud and breach of trust.
(h) Agreements affecting the freedom or security of marriage, or otherwise in derogation of the marriage relation.
(i) Agreements in derogation of the parental relation.
(j) Agreements in unreasonable restraint of trade, including combinations to prevent competition, control prices, and create monopolies.
(k) Agreements exempting a person or corporation from liability for negligence.

There are many things which the law does not prohibit in the sense of attaching penalties, but which are so mischievous in their nature and tendency that, on grounds of public policy, they cannot be admitted as the subject of a valid contract.

It is clearly to the interest of the public, however, that persons should not be unnecessarily restricted in their freedom to make

403, 112 S. W. 1068, 21 L. R. A. (N. S.) 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844. *See "Lotteries," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

[27] Yellowstone Kit v. State, 88 Ala. 196, 7 South. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38; Cross v. People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292; State v. Nebraska Home Co., 66 Neb. 349, 92 N. W. 763, 60 L. R. A. 448, 103 Am. St. Rep. 706, 1 Ann. Cas. 88. *See "Lotteries," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3.*

their own contracts. As expressed in a celebrated passage in an English decision:[28] "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider: That you are not lightly to interfere with this freedom of contract." The interests of the public, however, do require that there shall be some restrictions on the freedom of persons to enter into contracts. "The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public."[29]

The phrase public policy "has no fixed legal significance. It varies, and must vary, with the changing conditions and laws of civilizations and peoples."[30] The term is not to be understood in the sense of "political expedience," as meaning what, in the opinion of the courts, is for the advantage of the community.[31] Some courts have been even more conservative in their statement of the rule, and have declared that "the public policy of a state or nation must be determined by its constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or

[28] Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, per Jessel, M. R. And see JAMES QUIRK MILLING CO. v. MINNEAPOLIS & ST. L. R. CO., 98 Minn. 22, 107 N. W. 742, 116 Am. St. Rep. 336, Throckmorton Cas.-Contracts, 286; Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 South. 761 (collecting and discussing cases); Pittsburg, C. C. & St. L. Ry. v. Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; Hartford Ins. Co. v. Chicago, M. & St. P. Ry. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; McCowen v. Pew, 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630; Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[29] West Virginia Transp. Co. v. Pipe-Line Co., 22 W. Va. 600, 46 Am. Rep. 527. And see Mumford v. Chicago, R. I. & P. Ry. Co., 128 Iowa, 685, 104 N. W. 1135. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[30] Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Picket Pub. Co. v. Carbon County Com'rs, 36 Mont. 188, 92 Pac. 524, 13 L. R. A. (N. S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[31] Egerton v. Earl Brownlow, 4 H. L. Cas. 1, 123, per Parke, B. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–411.*

judges as to the demands of the interests of the public." [32] A tendency to prejudice the public interest must clearly appear before a court is warranted in pronouncing a contract void on that account.[33] The mere fact that a contract is improvident or foolish as to one of the parties does not render it void as against public policy,[34] but a contract is void if its effect would be to prevent a party from thereafter acquiring any property whatever.[35]

The validity of a contract must be determined, not by the good faith of the parties, or by what has been done under it, but by its general tendency at the time it is made.[36] "If this general tendency is opposed to the interests of the public, such contracts are invalid, however good the intent of the parties to them, and even though no harm to any one resulted, or would result, in the particular case." [37]

SAME—AGREEMENTS TENDING TO INJURE THE PUBLIC SERVICE

156. Among the agreements which are illegal as tending to injure the public service may be mentioned—

(a) Agreements for the sale of, or other traffic in, a public office, or its emoluments.

[32] Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 202, 17 C. C. A. 62, 30 L. R. A. 193. And see Picket Pub. Co. v. Carbon County Com'rs, 36 Mont. 188, 92 Pac. 524, 13 L. R. A. (N. S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986; Mut. Life Ins. Co. of New York v. Durden, 9 Ga. App. 797, 72 S. E. 295. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[33] Smith v. Du Bose, 78 Ga. 413, 435, 3 S. E. 309, 6 Am. St. Rep. 260; Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956; Couch v. Hutchinson, 2 Ala. App. 444, 57 South. 73 (contract for sale of right to vend patent churn sustained); Electrova Co. v. Spring Garden Ins. Co., 156 N. C. 232, 72 S. E. 306, 35 L. R. A. (N. S.) 1216; Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 South. 609, 16 Ann. Cas. 738. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[34] Craig v. United States Health & Accident Ins. Co., 80 S. C. 1, 61 S. E. 423, 18 L. R. A. (N. S.) 106, 128 Am. St. Rep. 877, 15 Ann. Cas. 216. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[35] Baltimore Humane Impartial Soc. & Aged Women's & Aged Men's Homes v. Pierce, 100 Md. 520, 60 Atl. 277, 70 L. R. A. 485. *See "Contracts," Dec. Dig. (Key-No.) § 108; Cent. Dig. §§ 498–511.*

[36] Sherman v. Burton, 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87; Noble v. Davison, 177 Ind. 19, 96 N. E. 325. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

[37] Sheppey v. Stevens (C. C.) 177 Fed. 484. And see Richardson v. Crandall, 48 N. Y. 348, 362; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

(b) Agreements by public officers for greater pay than is fixed by law for performance of official duty; or for less pay where the services are yet to be performed.

(c) Assignment of his future salary, and, under some circumstances, of his pension, by a public officer.

(d) Agreements to influence legislation by personal solicitation of the legislators, or other objectionable means.

(e) Agreements to procure administrative action by public officers by corrupt means. Some, but not all, courts hold that any agreement by a third person, for a compensation, to procure such action, is illegal, because of its tendency to introduce corrupt means.

(f) Agreements by public or quasi public corporations which interfere with their performance of the duties which they owe to the public.

As the public has an interest in the proper performance of their duty by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency, or otherwise interfere with the due execution of the duties of the office, such agreements are contrary to public policy and void.[38]

Traffic in Public Offices

As stated by Greenhood,[39] therefore, "any contract to appoint one to public office,[40] or involving the sale of a public[41] or quasi pub-

[38] Benson v. Bawden, 149 Mich. 584, 113 N. W. 20, 13 L. R. A. (N. S.) 721, in which an agreement by a postmaster to remove the post office to a particular building and maintain it there during his term, for a consideration moving to himself, was held void, because the public interest required the exercise of his best judgment in the location of the office. But where a public institution must be located or structure built, private contributions inuring to the benefit of the government on condition that a particular location is selected are not against public policy. Currier v. United States, 184 Fed. 700, 106 C. C. A. 654. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[39] Greenh. Pub. Pol. rule 287, p. 338.

[40] Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17; Hager v. Catlin, 18 Hun (N. Y.) 448; Schneider v. Local Union No. 60, 116 La. 270, 40 South. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549, 7 Ann. Cas. 868; Stout v. Ennis, 28 Kan. 706. A contract by an officer after election, to employ a person as his deputy may be valid. Stout v. Ennis, supra. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[41] Hall v. Gavitt, 18 Ind. 390; Card v. Hope, 2 Barn. & C. 661; Proprietors of Cardigan v. Page, 6 N. H. 183; Town of Meredith v. Ladd, 2 N. H. 517; Love v. Buckner, 4 Bibb (Ky.) 506; Groton v. Inhabitants of Waldoborough, 11 Me. 306, 26 Am. Dec. 530; Martin v. Royster, 8 Ark. 74; Outon v. Rodes, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193; Engle v. Chipman, 51 Mich. 524, 16 N. W. 886; Alvord v. Collin, 20 Pick. (Mass.) at page 428. The legis-

lic[42] office, or to do anything in consideration of the promisee exchanging office with,[43] or securing an office for[44] the promisor, or recommending him for such office,[45] or resigning any office,[46] is void."

As tending to injure the public service may also be mentioned agreements by which a person not occupying a public office secures to himself all or any part of its benefits or emoluments.[47] Other agreements to which this principle applies are agreements by a public officer to pay another for performing the duties of his office for him, for an officer has no authority to delegate his duties to another;[48] but this does not apply where an officer merely employs a deputy or other private person to assist him.[49]

Agreements Affecting the Compensation of Public Officers

As we have seen, a promise to pay a public officer for performing duties which he is required by law to perform without such compensation, or to pay him more than the fees fixed by law, is void for

lature may provide for sale of an office. Town of Thetford v. Hubbard, 22 Vt. 440. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[42] Blatchford v. Preston, 8 Term R. 89; Card v. Hope, 2 Barn. & C. 661. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[43] Stroud v. Smith, 4 Houst. (Del.) 448. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[44] Gray v. Hook, 4 N. Y. 449; Law v. Law, 3 P. Wms. 391; Meguire v. Corwine, 101 U. S. 111, 25 L. Ed. 899; Nichols v. Mudgett, 32 Vt. 546; Martin v. Wade, 37 Cal. 168; Hunter v. Nolf, 71 Pa. 282; Morse v. Ryan, 26 Wis. 356; Harris v. Chamberlain, 126 Mich. 280, 85 N. W. 728; Eversole v. Holliday, 131 Ky. 202, 114 S. W. 1195. A contract by the heir not to object to the public administrator acting as administrator of the estate is void as trafficking in the office. In re Irwin's Estate, 123 Mo. App. 508, 100 S. W. 565. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[45] Hartwell v. Hartwell, 4 Ves. 811; Edwards v. Randle, 63 Ark. 318, 38 S. W. 343, 36 L. R. A. 174, 58 Am. St. Rep. 108. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[46] Eddy v. Capron, 4 R. I. 394, 67 Am. Dec. 541; Meacham v. Dow, 32 Vt. 721; Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. Rep. 463. And see Forbes v. McDonald, 54 Cal. 98. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[47] Greenh. Pub. Pol. rule 293, p. 349. An agreement by which one party stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that the other will aid him in obtaining it, is void. Gray v. Hook, 4 N. Y. 449. And see Deyoe v. Woodworth, 144 N. Y. 448, 39 N. E. 375. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

[48] Engle v. Chipman, 51 Mich. 524, 16 N. W. 886; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

[49] Price v. Caperton, 1 Duv. (Ky.) 207. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

want of consideration.[50] Such contracts are also illegal as being contrary to public policy.[51] "The rewards of officers," it has been said, "are established by law. Their services are to be performed for those legal rewards; and other private rewards for acts which are required from them * * * must be regarded as corrupt and illegal exactions."[52] To recognize as valid contracts for additional compensation would tend to cause officers to neglect their duties unless promised such additional compensation, and would thus tend to make bribery the only means by which the laws could be enforced.[53] The rule does not apply so as to prevent an officer from recovering on a promise to pay him for doing more than he is required by law to do.[54]

It has also been held that an agreement by a public officer, before performance of services, to accept less than the fees fixed by law, is against public policy.[55]

[50] Ante, p. 157.

[51] Weaver v. Whitney, 1 Hopk. Ch. (N. Y.) 13; Preston v. Bacon, 4 Conn. 471; Neustadt v. Hall, 58 Ill. 172; Trundle's Adm'r v. Riley, 17 B. Mon. (Ky.) 396; Gilmore v. Lewis, 12 Ohio, 281; Brown v. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; Adams Co. v. Hunter, 78 Iowa, 328, 43 N. W. 208, 6 L. R. A. 615; Foley v. Platt, 105 Mich. 635, 63 N. W. 520; ante, p. 157, and cases there cited. Bond of indemnity given a sheriff to induce him to do what he was required to do without it. Mitchell v. Vance, 5 T. B. Mon. (Ky.) 528, 17 Am. Dec. 96. Bond indemnifying officer against loss for omitting to execute process. Harrington's Adm'r v. Crawford, 136 Mo. 467, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. Rep. 653. A public officer is not entitled to reward offered for the arrest which it was his duty to make without pay. Smith v. Whildin, 10 Pa. 39, 49 Am. Dec. 572; Gilmore v. Lewis, 12 Ohio, 281; Pool v. City of Boston, 5 Cush. (Mass.) 219; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Davies v. Burns, 5 Allen (Mass.) 349. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

[52] Weaver v. Whitney, 1 Hopk. Ch. (N. Y.) 13. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

[53] Dull v. Mammoth Min. Co., 28 Utah, 467, 79 Pac. 1050. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

[54] Trundle v. Riley, 17 B. Mon. (Ky.) 396; McCandless v. Steel Co., 152 Pa. 139, 25 Atl. 579; Carroll v. Tyler, 2 Har. & G. (Md.) 57. An officer may recover a reward offered for apprehension of a criminal, if it was no part of his duty to make the arrest. Morrell v. Quarles, 35 Ala. 544; Evans v. Inhabitants of City of Trenton, 24 N. J. Law, 764. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

[55] Bodenhofer v. Hogan, 142 Iowa, 321, 120 N. W. 659, 134 Am. St. Rep. 418, 19 Ann. Cas. 1073; Gallaher v. City of Lincoln, 63 Neb. 339, 88 N. W. 505; City of Pittsburg v. Goshorn, 230 Pa. 212, 79 Atl. 505; Hawkeye Ins. Co. v. Brainard, 72 Iowa, 130, 33 N. W. 603; Edgerly v. Hale, 71 N. H. 138, 51 Atl. 679 (sheriff's fee for service payable only if action successful). Contra, Bloom v. Hazzard, 104 Cal. 310, 37 Pac. 1037. Cf. Peters v. City of Davenport, 104 Iowa, 625, 74 N. W. 6. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. §§ 583–585.*

Assignment of Salary or Pension by Officer

The rule also applies to the assignment of their salaries by public officers. One of the reasons given by an English judge was that "it is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty." [56] It is not regarded as contrary to public policy for an officer to assign his salary after it has become due, but an assignment of it before it is due is void. The reason is that an officer is not apt to be as efficient in the performance of his duties after he has assigned his unearned salary.[57] The rule has been carried so far as to render void a contract by a public officer to apply unearned salary or fees to the payment of certain obligations upon which he was liable with others.[58]

So, also, the assignment of a pension may be illegal if it is not granted exclusively for past services. "Where the pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of service which the party has already performed, it is against the policy of the law that it should be assignable." [59]

[56] Wells v. Foster, 8 Mees. & W. 149. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. § 583; "Assignments," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 23.*

[57] BLISS v. LAWRENCE, 58 N. Y. 442, 48 How. Prac. (N. Y.) 22, 17 Am. Rep. 273, Throckmorton Cas. Contracts, 236; Banks v. Dunn, 66 Cal. 72, 4 Pac. 963; Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263; State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358; Field v. Chipley, 79 Ky. 260, 42 Am. Rep. 215; National Bank of El Paso v. Fink, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833; Brackett v. Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; First Nat. Bank v. State, 68 Neb. 482, 94 N. W. 633, 4 Ann. Cas. 423; Contra, State Bank v. Hastings, 15 Wis. 78. The rule applies to an assignment of his fees by an executor before they are ascertained and fixed as provided by statute. In re Worthington, 66 Hun, 633, 22 N. Y. Supp. 1110; Id., 141 N. Y. 9, 35 N. E. 929, 23 L. R. A. 97. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. § 583; "Assignments," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 23.*

[58] Serrill v. Wilder, 77 Ohio, 343, 83 N. E. 486, 14 L. R. A. (N. S.) 982. *See "Contracts," Dec. Dig. (Key-No.) § 125; Cent. Dig. § 583; "Assignments," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 23.*

[59] Wells v. Foster, 8 Mees. & W. 149. And see BLISS v. LAWRENCE, 58 N. Y. 442, 17 Am. Rep. 273, Throckmorton Cas. Contracts, 236 (collecting the English cases). Act Cong. Feb. 28, 1883, c. 58, § 2, 22 Stat. 432 (U. S. Comp. St. 1901, p. 3278), makes void any "pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension." See Loser v. Board, 92 Mich. 633, 52 N. W. 956. *See "Pensions," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 11.*

Lobbying Contracts

What are known as "lobbying contracts" also fall within this class of illegal agreements. Any agreement to render services in procuring legislative action, either by congress or by a state legislature or by a municipal council, by personal solicitation of the legislators or other objectionable means, is contrary to the plainest principles of public policy, and is void.[60] "A contract for lobby services," it is said in a New York case, "for personal influence, for mere importunities to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions, or inducements than as directly and legitimately bear upon the merits of the pending application, is illegal, and against public policy, and void;"[61] and it has been held that a promise to pay a contingent fee on the passage of a bill is void, because such a fee is "a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature."[62]

[60] TRIST v. CHILD, 21 Wall. 441, 22 L. Ed. 623, Throckmorton Cas. Contracts, 241; Spalding v. Ewing, 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. Rep. 608; Frost v. Belmont, 6 Allen (Mass.) 152; Rose v. Truax, 21 Barb. (N. Y.) 361; Powers v. Skinner, 34 Vt. 274, 80 Am. Dec. 677; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213; Cook v. Shipman, 24 Ill. 614; Houlton v. Dunn, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737, 51 Am. St. Rep. 493; Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243; Hayward v. Manufacturing Co., 85 Fed. 4, 29 C. C. A. 438; Burke v. Wood (C. C.) 162 Fed. 533. "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action." Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535. And see Veazey v. Allen, 173 N. Y. 359, 66 N. E. 103, 62 L. R. A. 362. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[61] Brown v. Brown, 34 Barb. (N. Y.) 533. And see Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[62] Wood v. McCann, 6 Dana (Ky.) 366. And see Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953; Coquillard's Adm'r v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Harris v. Roof's Ex'rs, 10 Barb. (N. Y.) 489; Weed v. Black, 2 MacArthur (9 D. C.) 268, 29 Am. Rep. 618; Chippewa Valley & S. Ry. Co. v. Railway Co., 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601; Critchfield v. Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; Richardson v. Scotts Bluff County, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682. But see, contra, Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Workman v. Campbell, 46 Mo. 305; Burbridge v. Fackler, 2 MacArthur (9 D. C.) 407; Denison v. Crawford Co., 48 Iowa, 211; Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784. The legislature may determine what public policy requires or permits in prosecuting claims of the state against the United

The rule, however, does not apply to an agreement, for purely professional services, such as the drafting of a petition to set forth a claim for presentment to the legislature, attending the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more objectionable.[63]

Corruption of Public Officers

"Any contract," says Greenhood,[64] "contemplating the use of secret influence with public officers,[65] or calculated to induce the use of such influence,[66] is void, especially when one of the parties is a public officer himself,[67] though he be but a representative of a foreign

States, and the manner of compensation. Davis v. Com., 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743. See, also, Opinion of Justices, 72 N. H. 601, 54 Atl. 950. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[63] TRIST v. CHILD, 21 Wall. 441, 22 L. Ed. 623, Throckmorton Cas. Contracts, 241; Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Chesebrough v. Conover, 140 N. Y. 382, 35 N. E. 633 (affirming 66 Hun, 634, 21 N. Y. Supp. 566); Salinas v. Stillman, 66 Fed. 677, 14 C. C. A. 50. And see Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928; Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161, 16 Ann. Cas. 846. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[64] Greenh. Pub. Pol. p. 357, rule 300.

[65] Murray v. Wakefield, 9 Mo. App. 591; Hutchen v. Gibson, 1 Bush (Ky.) 270. To use influence to procure session of legislature at a particular place. Thorne v. Yontz, 4 Cal. 321. To use influence, or agreement tending to encourage use of influence, with the prosecuting attorney in respect to criminal prosecutions. Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391; Wight v. Rindskopf, 43 Wis. 344; Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346; Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 93; Barron v. Tucker, 53 Vt. 338, 38 Am. Rep. 684. Agreement for compensation to use influence to procure pardon of convict, or commutation of sentence. Haines v. Lewis, 54 Iowa, 301, 6 N. W. 495, 37 Am. Rep. 202; O'Reilly v. Cleary, 8 Mo. App. 186; Kribben v. Haycraft, 26 Mo. 396; Hatzfield v. Gulden, 7 Watts (Pa.) 152, 31 Am. Dec. 750; Norman v. Cole, 3 Esp. 253; Deering & Co. v. Cunningham, 63 Kan. 174, 65 Pac. 263, 54 L. R. A. 410. But see Formby v. Pryor, 15 Ga. 258; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; Rau v. Boyle, 5 Bush (Ky.) 253; Timothy v. Wright, 8 Gray (Mass.) 522; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329—sustaining such an agreement where no corrupt means were to be resorted to. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[66] TRIST v. CHILD, 21 Wall. 441, 22 L. Ed. 623, Throckmorton Cas. Contracts, 241; Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868; Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391; Bowman v. Coffroth, 59 Pa. 19; O'Hara v. Carpenter, 23 Mich. 410, 9 Am. Rep. 89. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[67] Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Hovey v. Storer,

government, and his position be merely honorary." [68] Under this rule any agreement by which a person is to endeavor to procure a government contract for another by the use of corrupt means is illegal. Some courts hold that such an agreement, though a compensation is to be paid, is not illegal in itself, but becomes so only where corrupt means are to be resorted to.[69] Other courts, however, have held that any such agreement, for a compensation, is illegal, because of its tendency to introduce corrupt means. "Considerations," it has been said by the supreme court of the United States, "as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. * * * Whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds." [70]

It has also been held that a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, even though it may not be invalid according to the laws and customs of the foreign country. The courts will refuse to enforce such a contract, "not from any consideration of the interests of that government, or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people." [71]

63 Me. 486. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[68] Note 71, infra.

[69] Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Southard v. Boyd, 51 N. Y. 177; Beal v. Polhemus, 67 Mich. 130, 34 N. W. 532; Winpenny v. French, 18 Ohio St. 469; Barry v. Capen, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808; Formby v. Pryor, 15 Ga. 258; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[70] Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868. And see Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899; Devlin v. Brady, 36 N. Y. 531; Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69; Caton v. Stewart, 76 N. C. 357; Critchfield v. Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 847; Russell v. Courier Printing & Publishing Co., 43 Colo. 321, 95 Pac. 936; Hare v. Phaup, 23 Okl. 575, 101 Pac. 1050, 138 Am. St. Rep. 852. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[71] Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

As in the case of contracts to render services in procuring the passage of acts and ordinances, so also in the case of contracts to render services in procuring administrative action by government officials, the services contracted for may be legitimate. If the contract does not tend to induce the use of corrupt means, and in some jurisdictions, as we have seen, if corrupt means are not to be resorted to, the contract is valid.[72]

Agreements by Public or Quasi Public Corporations

As falling within this class of illegal contracts may also be mentioned agreements by public or quasi public corporations which interfere with their duties to the public.[73] Railroad companies and other common carriers, for instance, are regarded to some extent as public servants, and it is contrary to public policy for them to make any agreement whereby they may be hindered in serving the public. A contract by which a railroad corporation agrees to establish a station at a particular point or to build along a particular route to the exclusion of others, or not to build along a particular route or at a particular place, is void as tending to interfere with the duty of the railroad to serve the public.[74]

[72] Sedgwick v. Stanton, 14 N. Y. 289; Burbridge v. Fackler, 2 MacArthur (9 D. C.) 407; Painter v. Drum, 40 Pa. 467, ante, p. 357. Contract to procure by legitimate means a pardon, commutation of sentence, etc., in a proper case. Note 65, supra. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[73] "Any contract which will disable a public or quasi public corporation from performing the duty which it has undertaken, or which has been imposed upon it, for the public weal, or compels it to make the public accommodation or convenience subservient to its private interests, is void." Greenh. Pub. Pol. rule 269; Chicago Gas-Light & Coke Co. v. Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Doane v. Railway Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; South Chicago City Ry. Co. v. Railway Co., 171 Ill. 391, 49 N. E. 576; West Va. Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co., 58 W. Va. 22, 50 S. E. 876, 112 Am. St. Rep. 936, 6 Ann. Cas. 154. The same doctrine has been applied so as to render void a contract by the proprietors of a hotel by which a telephone company was given the exclusive right to install telephones in the hotel. Central New York Telephone & Telegraph Co. v. Averill, 55 Misc. Rep. 346, 105 N. Y. Supp. 378 [affirmed 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878]. *See "Contracts," Dec. Dig. (Key-No.) § 115, 123; Cent. Dig. §§ 542–552, 570–575.*

[74] Cumberland Valley R. Co. v. Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132; St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357; St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Id., 104 Ill. 257; Williamson v. Railroad Co., 53 Iowa, 126, 4 N. W. 870, 36 Am. Rep. 206; Florida, C. & P. R. Co., v. State, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30. *See "Railroads," Dec. Dig. (Key-No.) §§ 46, 58; Cent. Dig. §§ 105, 130–136.*

In like manner, contracts by officers or agents of a railroad company, or by other individuals, under the assumption of influence with the company, for compensation to them for the exercise of their influence in favor of a particular location of route or station, is void, as tending to perpetrate a fraud on the company and to prevent the most efficient service to the public.[75] Some courts have even gone so far as to hold that any contract by a railroad company for the construction of its line along a particular route or the establishment of a station at a particular place is void as tending to interfere with its free choice from the sole standpoint of the public interest.[76]

On principle, however, and by the decided weight of authority, a contract of a railroad company is valid by which, in return for the subscription of stock, conveyance of land, or other consideration, it agrees merely to build along a particular line or to establish a station at a particular place, but not to the exclusion of other routes or locations.[77]

So, also, any other agreement by a railroad company or other corporation chartered as a common carrier, or for other quasi public purposes, as in the case of water or gas companies, by which it prevents itself from performing the duties which it owes to the

[75] Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; Holladay v. Patterson, 5 Or. 182; Bestor v. Wathen, 60 Ill. 138; Reed v. Johnson, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404. *See "Contracts," Dec. Dig. (Key-No.) § 121; Cent. Dig. § 495.*

[76] Fuller v. Dame, 18 Pick. (Mass.) 472; Burney's Heirs v. Ludeling, 47 La. Ann. 73, 16 South. 507; Ford v. Oregon Electric Ry. Co., 60 Or. 278, 117 Pac. 809, 36 L. R. A. (N. S.) 358. *See "Railroads," Dec. Dig. (Key-No.) § 46; Cent. Dig. § 105.*

[77] McCowen v. Pew, 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630; Baltimore, etc., R. Co. v. Ralston, 41 Ohio St. 587; Cumberland Valley R. Co. v. Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132; Farrington v. Stucky, 165 Fed. 325, 91 C. C. A. 311; Griswold v. Minneapolis, St. P. & S. S. M. Ry. Co., 12 N. D. 435, 97 N. W. 538, 102 Am. St. Rep. 572; Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Swartwout v. Railroad Co., 24 Mich. 389; First Nat. Bank v. Hendrie, 49 Iowa, 402, 31 Am. Rep. 153; Harris v. Roberts, 12 Neb. 631, 12 N. W. 89, 41 Am. Rep. 779; International & G. N. Ry. Co. v. Dawson, 62 Tex. 260; Texas & St. L. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; Telford v. Railroad Co., 172 Ill. 559, 50 N. E. 105; Lyman v. Railroad Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 615. "If the law were otherwise, it would be equivalent to a declaration that a community desiring the advantages of a line of railway, where chartered privileges permit its construction, would be, under the law, prevented and prohibited from inducing such construction by aiding the same." Piper v. Choctaw Northern Townsite & Imp. Co., 16 Okl. 436, 85 Pac. 965. *See "Railroads," Dec. Dig. (Key-No.) §§ 46–58; Cent. Dig. §§ 109, 133; "Contracts," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 570–575.*

public, is void.[78] A combination, therefore, between two railroad companies owning competing lines, by which one line is to be discontinued or leased to the other, will not be sustained.[79] This principle, it has been said, does not apply to individuals engaged in the business of common carriers. The owner of one line of steamers, it has been held, may make a contract with an individual owner of a competing line, by which the latter is to discontinue his vessels.[80]

Under this head may also be mentioned contracts by which a common carrier or other quasi public corporation makes an undue discrimination in favor of a particular person. Such a contract is not only generally prohibited by statute, but is contrary to public policy independently of any statutory provision on the subject.[81] Of this nature, for example, are contracts by railroad companies for "rebates" to particular shippers.[82] And, by the weight of authority, a contract by which a railroad company grants a telegraph company the exclusive privilege of operating a tele-

[78] Central Transp. Co. v. Palace-Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; York & M. Line R. Co. v. Winans, 17 How. 31, 15 L. Ed. 27; Peoria & R. I. R. Co. v. Mining Co., 68 Ill. 489; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Peters v. Rylands, 20 Pa. 497, 59 Am. Dec. 746; State v. Railroad Co., 29 Conn. 538; Denver & N. O. R. Co. v. Railroad Co. (C. C.) 15 Fed. 650. See, also, Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co. (Ind. App.) 70 N. E. 843, holding that a contract between two railroad companies by which one agrees not to furnish sidings to stone quarries near its line is illegal and void. A contract by a railroad company for the construction and maintenance of a spur track for the benefit of another corporation or an individual is not void if the performance of the contract does not interfere with any of the company's duties to the public. McKell v. Chesapeake & O. Ry. Co., 186 Fed. 89, 108 C. C. A. 141 [affirming 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097]; Riley v. Louisville, H. & St. L. Ry. Co., 142 Ky. 67, 133 S. W. 971, 35 L. R. A. (N. S.) 636, Ann. Cas. 1912D, 230. *See "Contracts," Dec. Dig. (Key-No.) §§ 116, 123; Cent. Dig. §§ 542–552, 570–575.*

[79] Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Greenh. Pub. Pol. p. 318 (collecting cases); Gulf, C. & S. F. Ry. Co. v. Morris, 67 Tex. 692, 4 S. W. 156. This is expressly prohibited or regulated by statute in most states. *See "Railroads," Dec. Dig. (Key-No.) §§ 119–121, 136, 137; Cent. Dig. §§ 376–385, 434, 435.*

[80] Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456. But see Anderson v. Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390. *See "Contracts," Dec. Dig. (Key-No.) §§ 117, 123; Cent. Dig. §§ 554–575.*

[81] Indianapolis, D. & S. R. Co. v. Ervin, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369; Scofield v. Railroad Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Chesapeake & P. Telephone Co. v. Telegraph Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167. *See "Carriers," Dec. Dig. (Key-No.) § 199; Cent. Dig. §§ 901–905.*

[82] See cases cited supra, note 81.

graph along the line of its road is contrary to public policy and void.[83]

Agreements Affecting the Government, etc.

There are many agreements which, though not tending to injure the public service, injuriously affect the government itself in some other way, and which are therefore illegal, as contrary to public policy.[84] These agreements are collected by Greenhood,[85] and may be shortly stated as follows: (1) Agreements contemplating the appropriation of public money for purposes not sanctioned by law.[86] (2) Agreements which seek to secure to strangers a gratuity which the public has offered for services rendered; as in the case of an agreement to secure to a stranger bounties offered by the government for military services.[87] (3) Agreements which seek to secure to a stranger the benefit of a privilege granted by the government to the promisor; as, for instance, where a person who has received from the government a license to trade with the Indians agrees for a consideration to share the profits with a stranger.[88] (4) Agreements with an alien enemy.[89]

An agreement, the object or natural tendency of which is to

[83] Georgia R. & Banking Co. v. Atlantic Postal Telegraph Cable Co. (C. C.) 152 Fed. 991; Western Union Telegraph Co. v. Telegraph Co., 65 Ga. 160, 38 Am. Rep. 781. Contra, Western Union Telegraph Co. v. Railroad Co., 86 Ill. 246, 29 Am. Rep. 28; Canadian Pac. R. Co. v. Telegraph Co., 17 Can. S. C. R. 151. *See "Contracts," Dec. Dig. (Key-No.) §§ 116, 123; Cent. Dig. §§ 542–552, 570–575.*

[84] Fisher Electric Co. v. Iron Works, 116 Mich. 293, 74 N. W. 493. "Contracts which take advantage of the depreciation of the national currency, or which contemplate speculation on such depreciation, are valid." Greenh. Pub. Pol. rule 305, p. 370; Cox v. Smith, 1 Nev. 161, 90 Am. Dec. 476. Agreements for the purchase and sale of gold. Brown v. Speyers, 20 Grat. (Va.) 296; Cooke v. Davis, 53 N. Y. 318; Cameron v. Durkheim, 55 N. Y. 423; Peabody v. Speyers, 56 N. Y. 230. *See "Contracts," Dec. Dig. (Key-No.) § 123; Cent. Dig. §§ 570–575.*

[85] Greenh. Pub. Pol. rules 302–315.

[86] Capehart v. Rankin, 3 W. Va. 571, 100 Am. Dec. 779. *See "Contracts," Dec. Dig. (Key-No.) § 103; Cent. Dig. §§ 468–476.*

[87] Decker v. Saltsman, 1 Hun (N. Y.) 421. *See "Bounties," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–35.*

[88] Gould v. Kendall, 15 Neb. 549, 19 N. W. 483. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 480–487.*

[89] Ante, p. 182. See Greenh. Pub. Pol. rules 306–315. "It was a principle of the common law that trading with an enemy, without the king's license, was illegal in British subjects." Potts v. Bell, 8 Term R. 548. Some writers class such agreements among those in breach of express rules of the common law. *See "Contracts," Dec. Dig. (Key-No.) § 133; Cent. Dig. §§ 662–680.*

diminish competition among the applicants or bidders for a public contract or for a public franchise, is illegal as against public policy.[90]

SAME—AGREEMENTS PROMOTIVE OF NONOFFICIAL CORRUPTION[91]

157. The illegal agreements which may be classified under this head are:

(a) Agreements by a private citizen to violate a duty which he owes to the public.

(b) Agreements tending to impair the integrity of public elections.

Among the agreements which may be treated under the first head, and which are deemed contrary to public policy and illegal, are agreements in consideration of a person's forbearing to petition for the repeal of a public law,[92] or to oppose on public grounds any measure or proceeding before a legislative body,[93] agreements tending to suppress inquiry by the legislature into matters of public concern,[94] agreements in consideration of a person's opposing[95] or of his approving or not opposing a public improvement or other public project,[96] or withdrawing his petition for such an improvement.[97]

[90] McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Boyle v. Adams, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96; Conway v. Post Co., 190 Ill. 89, 60 N. E. 82; Baird v. Sheehan, 38 App. Div. 7, 56 N. Y. Supp. 228, affirmed 166 N. Y. 631, 60 N. E. 1107; Pendleton v. Asbury, 104 Mo. App. 723, 78 S. W. 651. See, also, Kine v. Turner, 27 Or. 356, 41 Pac. 664. Cf. Hyer v. Traction Co., 168 U. S. 471, 18 Sup. Ct. 115, 42 L. Ed. 547; ante, p. 318. *See "Contracts," Dec. Dig. (Key-No.) § 132; Cent. Dig. §§ 659–661.*

[91] Greenh. Pub. Pol. p. 383.

[92] Reed v. Warehouse Co., 2 Mo. App. 82. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[93] Pingry v. Washburn, 1 Aikens (Vt.) 264, 15 Am. Dec. 676. This rule does not apply to opposition to private legislation on purely private grounds. Greenh. Pub. Pol. rule 817, p. 384. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[94] Usher v. McBratney, 3 Dill. 385, Fed. Cas. No. 16,805. *See "Contracts," Dec. Dig. (Key-No.) § 126; Cent. Dig. §§ 586–593.*

[95] Slocum v. Wooley, 43 N. J. Eq. 451, 11 Atl. 264. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[96] Howard v. Independent Church, 18 Md. 451; Maguire v. Smock, 42 Ind. 1, 13 Am. Rep. 353; Smith v. Applegate, 28 N. J. Law, 352; Doane v. Rail-

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[97] Jacobs v. Tobiason, 65 Iowa, 245, 21 N. W. 590, 54 Am. Rep. 9. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

Any agreement which tends to impair the integrity of public elections is clearly contrary to public policy.[88] "Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty, and if, for money or other personal profit, he agrees to exert his influence against what he believes to be for the public good, he is corrupt, and the agreement void." [89] A promise, therefore, in consideration of the promisee's voting for the promisor for a public office,[1] or procuring his nomination,[2] or aiding in procuring his election,[3] or of withdrawing himself as a candidate for election,[4] or a promise to pay money if a certain candidate shall be elected, is illegal and void. A bet on the result of an election is illegal even in the absence of a statutory prohibition.[5]

way Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; Greer, Hawes & Co. v. Severson, 119 Iowa, 84, 93 N. W. 72 (consent of property holder required by statute to establishment of saloon). Where the opposition is on purely private grounds, it has been held that the rule does not apply. Weeks v. Lippencott, 42 Pa. 474. Cf. Montclair Military Academy v. Railway Co., 65 N. J. Law, 328, 47 Atl. 890. *See "Contracts," Dec. Dig. (Key-No.) § 131; Cent. Dig. §§ 594–607.*

[88] A person who furnishes liquor or refreshments to electors at the request of another, for the purpose of influencing them in their votes, cannot recover therefor. Duke v. Asbee, 33 N. C. 112; Greenh. Pub. Pol. p. 389. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[89] Nichols v. Mudgett, 32 Vt. 546; Roby v. Carter, 6 Tex. Civ. App. 295, 25 S. W. 725; Burden Bank v. Phelps, 5 Kan. App. 685, 48 Pac. 938. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[1] Nichols v. Mudgett, 32 Vt. 546; ante, p. 856. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[2] Liness v. Hesing, 44 Ill. 113, 92 Am. Dec. 153; LIVINGSTON v. PAGE, 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901, Throckmorton Cas. Contracts, 246 (to use influence of newspaper to secure nomination). *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[3] Stout v. Ennis, 28 Kan. 706; Swayze v. Hull, 8 N. J. Law, 54, 14 Am. Dec. 399; Ham v. Smith, 87 Pa. 63. This does not apply to "an agreement to pay for open advocacy of the election of a candidate, or for legitimate political work." Greenh. Pub. Pol. 393; Murphy v. English, 64 How. Prac. (N. Y.) 362; Sizer v. Daniels, 66 Barb. (N. Y.) 426. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[4] Robinson v. Kalbfleisch, 5 Thomp. & C. (N. Y.) 212. *See "Contracts," Dec. Dig. (Key-No.) § 124; Cent. Dig. §§ 576–585.*

[5] Lockhart v. Hullinger, 2 Ill. App. 465; Gordon v. Casey, 23 Ill. 70; Guyman v. Burlingame, 36 Ill. 201; Vischer v. Yates, 11 Johns. (N. Y.) 23; McAllister v. Hoffman, 16 Serg. & R. (Pa.) 147, 16 Am. Dec. 556; Wroth v. Johnson, 4 Har. & McH. (Md.) 284; Gregory v. King, 58 Ill. 169, 11 Am. Rep. 56 (bet in one state on result of presidential election in another); Greenh. Pub. Pol. 391. *See "Gaming," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 13.*

SAME—AGREEMENTS TENDING TO PERVERT OR OBSTRUCT PUBLIC JUSTICE

158. Any agreement which tends to pervert or obstruct public justice is contrary to public policy, and void.

159. COMPOUNDING CRIME. An agreement to stifle a criminal prosecution is illegal.

160. ARBITRATION. Agreements to refer matters to arbitration as a condition precedent to suit, at least if not going to the whole question of liability, are valid; but it is otherwise where the agreement is to refer to arbitration alone, and not to sue at all.

Any agreement which tends to pervert or obstruct public justice, even though it may not amount to a crime,[6] is illegal, as being contrary to public policy. If an agreement, for instance, tends to induce a witness to perjure himself, or to give false testimony through bias, or if it tends to induce parties to procure false testimony, it will not be enforced.[7] In an Alabama case a party had promised to give a witness, for attending court, a sum of money in excess of his legal fees, the amount of the compensation to depend on the promisor's success in the suit, and the agreement was held void. "Such contracts," said the court, "are against sound policy, because their inevitable tendency is. if not to invite to perjury, at least to sway the mind of the witness, by giving him the interest of a party to the cause, and thus contaminate the stream of justice at its source."[8] For the same

[6] Clark, Cr. Law (2d Ed.) 148, 376, and cases cited; Buck v. Bank, 27 Mich. 293, 15 Am. Rep. 189. Agreement for feigned suit to test validity of bounds before issue. Van Horn v. Kittitas County (C. C.) 112 Fed. 1. Agreement by a lawyer for an additional fee if he succeeded in suspending the enforcement or operation of a criminal statute. Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S. W. 954, 38 L. R. A. (N. S.) 842, Ann. Cas. 1913A, 121. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[7] Gillet v. Logan Co., 67 Ill. 256; Goodrich v. Tenney, 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459; Patterson v. Donner, 48 Cal. 369; Greenh. Pub. Pol. p. 441, and cases cited; Hutley v. Hutley, L. R. 8 Q. B. 112; Paton v. Stewart, 78 Ill. 481; Bowling v. Blum (Tex. Civ. App.) 52 S. W. 97; Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834; Neece v. Joseph, 95 Ark. 552, 129 S. W. 797, 30 L. R. A. (N. S.) 278, Ann. Cas. 1912A, 655. A contract to procure such testimony as will procure a verdict is void. Quirk v. Muller, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[8] Dawkins v. Gill, 10 Ala. 206. There are many cases which hold that an

reason a contract is void by which an injured person agrees[9] to pay his physician a portion of any amount recovered by him for the injury.[9] So, also, agreements are illegal if they contemplate the suppression of lawful evidence.[10] And a contract between a lawyer and a layman by which the latter is to hunt up cases and bring them to the lawyer in consideration of a portion of the fees is void.[11]

A contract by a principal in a bail bond in a criminal case to indemnify his surety has been declared void in some jurisdictions, on the ground that "it gives the public the security of one person only, instead of two";[12] in other jurisdictions however, such contracts have been sustained.[13] And the courts are agreed that a contract by a third person to indemnify the surety is valid, for here the public still has the security of two persons.[14]

All agreements, it is said in a late Indiana case, relating to proceedings in courts, civil or criminal, which may involve anything inconsistent with the impartial course of justice, are void, though not open to the charge of actual corruption, and regardless of the good faith of the parties, or of the fact that no evil resulted therefrom.[15]

agreement by a party to pay a witness compensation in addition to his legal fees is contrary to public policy. See Greenh. Pub. Pol. p. 441. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[9] Sherman v. Burton, 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87; Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[10] Greenh. Pub. Pol. p. 441. As, where an attorney for a consideration agrees with a person accused of crime to procure the release from jail of a witness against him. Crisup v. Grosslight, 79 Mich. 380, 44 N. W. 621. And see Bostick v. McClaren, 2 Brev. (S. C.) 275; Badger v. Williams, 1 D. Chip. (Vt.) 137; Thompson v. Whitman, 49 N. C. 47; Young v. Thomson, 14 Colo. App. 294, 59 Pac. 1030. Regulating disclosure of witness. Wight v. Rindskopf, 43 Wis. 344. Asserting unjust claims. Rhodes v. Sparks, 6 Pa. 473. Contract for a consideration to induce witness to leave the state and remain away. Small v. Lowrey, 166 Mo. App. 108, 148 S. W. 132. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[11] Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 116–132; "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 35.*

[12] United States v. Greene (C. C.) 163 Fed. 442. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[13] Moloney v. Nelson, 158 N. Y. 351, 53 N. E. 31; Essig v. Turner, 60 Wash. 175, 110 Pac. 998; Carr v. Davis, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58, 16 Ann. Cas. 1031. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[14] United States v. Greene (C. C.) 163 Fed. 442; Essig v. Turner, 60 Wash. 175, 110 Pac. 998. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[15] Brown v. Bank, 137 Ind. 165, 37 N. E. 158, 24 L. R. A. 206 (contract made

So, also, it is to the interest of the public that litigants should be free to settle their disputes, and a contract between an attorney and client, by which the client is forbidden to settle his cause of action without consent of the attorney, is contrary to public policy and void.[16]

Compounding Crime

The most obvious example of agreements tending to obstruct public justice are agreements to stifle criminal prosecutions. "You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of benefit or profit to yourself." [17] Not only is an agreement not to prosecute a person for a crime void on the ground that it is against public policy, but it is void because the agreement is in itself a crime.[18] And the contract is void, whether made with the offender himself or with another for his benefit.[19]

by justice of peace whereby, in case the justice secures arrest, and the return of stolen property, he is to receive a percentage). See Weber v. Shay, 56 Ohio St. 116, 46 N. E. 877, 37 L. R. A. 230, 60 Am. St. Rep. 743 (contract by attorney to prevent indictment). Contract to withdraw opposition to probate of will not void. Seaman v. Colley, 178 Mass. 478, 59 N. E. 1017. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[16] Burho v. Carmichael, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305. *See "Contracts," Dec. Dig. (Key-No.) § 129; Cent. Dig. §§ 616–632.*

[17] Williams v. Bayley, L. R. 1 H. L. 200. And see Collins v. Blantern, 2 Wils. 341, 1 Smith, Lead. Cas. 387, notes; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; Roll v. Raguet, 4 Ohio, 400, 22 Am. Dec. 759; McMahan v. Smith, 47 Conn. 221, 36 Am. Rep. 67; Chandler v. Johnson, 39 Ga. 85; Schultz v. Culbertson, 46 Wis. 313, 1 N. W. 19; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; Gorham v. Keyes, 137 Mass. 583; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; Smith v. Steely, 80 Iowa, 738, 45 N. W. 912; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Davis v. Smith, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584; Kirkland v. Benjamin, 67 Ark. 480, 55 S. W. 840; Smith Premier Typewriter Co. v. Mayhew, 65 Neb. 65, 90 N. W. 993. A prosecution for seduction cannot be compounded. Budd v. Rutherford, 4 Ind. App. 386, 30 N. E. 1111. Nor prosecution for obstructing a highway. Amestoy v. Transit Co., 95 Cal. 311, 30 Pac. 550. A contract not to sue for pollution of stream, amounting to public nuisance, is void. Weston Paper Co. v. Comstock (Ind.) 58 N. E. 79. It makes no difference whether the agreement is express or implied. Janis v. Roentgen, 52 Mo. App. 114. If no crime was in fact committed, the contract is not illegal. Smith v. Blachley, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887; Treadwell v. Tobert, 122 Ala. 297, 25 South. 216; Woodham v. Allen, 130 Cal. 194, 62 Pac. 398. But see State v. Carver, 69 N. H. 216, 39 Atl. 973. *See "Contracts," Dec. Dig. (Key-No.) § 128; Cent. Dig. §§ 633–653.*

[18] Clark, Cr. Law (2d Ed.) 383.

[19] Beal-Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58; Moyer v. Dodson, 212 Pa. 344, 61 Atl. 937. *See "Contracts," Dec. Dig. (Key-No.) § 128; Cent. Dig. §§ 633–653.*

It has been said that this rule is subject to exceptions in cases where civil and criminal remedies coexist, and that it is permissible in some cases to compromise with the offender, and agree not to prosecute him. In an English case it was said: "We shall probably be safe in laying it down that the law will permit a compromise of all offenses, though made the subject of a criminal prosecution, for which offenses the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offense is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." [20] In the United States this distinction is not generally recognized, and it is held that an agreement to compound a crime, whether misdemeanor or felony, is illegal.[21]

Of course, persons may always settle any claims they may have against each other, even though the claim may arise from the crime of one of them, as from larceny or embezzlement, provided there is no agreement not to prosecute for the crime.[22] It is the stifling of prosecutions which renders such agreements invalid. In some states parties are expressly permitted by statute to compromise prosecutions for certain misdemeanors.[23]

Reference to Arbitration

Agreements to refer matters in dispute to arbitration are sometimes regarded as attempts to "oust the jurisdiction of the courts," and to that extent will not be enforced.[24] The most common illus-

[20] Keir v. Leeman, 6 Q. B. 321. See, also, Id. 9 Q. B. 395; Windhill Local Board v. Vint, 45 Ch. D. 351. *See "Contracts," Dec. Dig. (Key-No.) § 128; Cent. Dig. §§ 633–653.*

[21] Partridge v. Hood, 120 Mass. 403, 21 Am. Rep. 524; Wright v. Rindskopf, 43 Wis. 361; Pearce v. Wilson, 111 Pa. 14, 2 Atl. 99, 56 Am. Rep. 243; Jones v. Dannenberg Co., 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271. And see State v. Carver, 69 N. H. 216, 39 Atl. 973. *See "Contracts," Dec. Dig. (Key-No.) § 128; Cent. Dig. §§ 633–653.*

[22] Flower v. Sadler, 10 Q. B. Div. 572; Nickelson v. Wilson, 60 N. Y. 362; Weber v. Barrett, 125 N. Y. 18, 25 N. E. 1068; Bothwell v. Brown, 51 Ill. 234; Cass County Bank v. Bricker, 34 Neb. 516, 52 N. W. 575, 33 Am. St. Rep. 649; Fosdick v. Van Arsdale, 74 Mich. 302, 41 N. W. 931; Portner v. Kirschner, 169 Pa. 472, 32 Atl. 442, 47 Am. St. Rep. 925; Sloan v. Davis, 105 Iowa, 97, 74 N. W. 922; Powell v. Flanary, 109 Ky. 342, 59 S. W. 5; Paige v. Hieronymus, 192 Ill. 546, 61 N. E. 832. *See "Contracts," Dec. Dig. (Key-No.) § 128; Cent. Dig. §§ 633–653.*

[23] Brown v. McCreight, 187 Pa. 181, 41 Atl. 45. *See "Contracts," Dec. Dig. (Key-No.) § 128; Cent. Dig. §§ 633–653.*

[24] Mutual Reserve Fund Life Ass'n v. Woolen Mills, 82 Fed. 508, 27 C. C. A. 212. Agreement between fidelity insurance company and employé whose honesty is guarantied that voucher showing payment by company to employer of loss occasioned through employé's dishonesty should be conclusive evidence against employé as to fact and extent of his liability to company, was void as

trations of such agreements are provisions in a building or construction contract for determination of questions by the architect or engineer, and in insurance policies for submission to arbitrators to determine the loss, though of course they are not limited to these contracts. An agreement to refer to arbitration, though so far valid that an action can be maintained for its breach,[25] will not be specifically enforced,[26] and does not oust the jurisdiction of the court; that is, it cannot be set up as a bar to an action brought to determine the very dispute which it was agreed to refer.[27] Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid.[28] It is very generally declared that an agreement to submit to arbitration the whole question of liability, and not merely those questions which affect the amount of damages, is void, even as a

against public policy. Fidelity & Casualty Co. of New York v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; Fidelity & Casualty Co. of New York v. Crays, 76 Minn. 450, 79 N. W. 531. Stipulation in contract entered into between Italian citizens, partly to be performed in Italy and partly in United States, that Italian courts should have exclusive jurisdiction of actions thereon, is not so objectionable, on grounds of public policy, that Massachusetts courts will refuse to give it the validity which it has under the Italian law, under the treaty with Italy, which gives citizens of each country full rights in the courts of the other. Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[25] Livingston v. Railli, 5 El. & B. 132; Munson v. Straits of Dover S. S. Co., 102 Fed. 926, 43 C. C. A. 57, affirming (D. C.) 99 Fed. 787. See Pollock, Cont. (3d Ed.) 308. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[26] Street v. Rigby, 6 Ves. 815, 818. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[27] Hurst v. Litchfield, 39 N. Y. 377; Chamberlain v. Railroad Co., 54 Conn. 472, 9 Atl. 244; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354; White v. Railroad Co., 135 Mass. 216; Mentz v. Insurance Co., 79 Pa. 480, 21 Am. Rep. 80; Reed v. Insurance Co., 138 Mass. 572; Allegre v. Insurance Co., 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; Kinney v. Association, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142; Hamilton v. Insurance Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708; Lesure Lumber Co. v. Insurance Co., 101 Iowa, 514, 70 N. W. 761; Voluntary Relief Department v. Spencer, 17 Ind. App. 123, 46 N. E. 477; Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115; Fox v. Association, 96 Wis. 390, 71 N. W. 363; Mitchell v. Dougherty, 90 Fed. 639, 33 C. C. A. 205; Kant v. Rice (Ky.) 55 S. W. 202; Hartford Fire Ins. Co. v. Horr, 66 Neb. 555, 92 N. W. 746, 60 L. R. A. 436, 103 Am. St. Rep. 725. But see Raymond v. Insurance Co., 114 Mich. 386, 72 N. W. 254; Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[28] Scott v. Avery, 5 H. L. Cas. 811; Viney v. Rignold, 20 Q. B. D. 172; President, etc., of Delaware & H. Canal Co. v. Coal Co., 50 N. Y. 250; HAMILTON v. INSURANCE CO., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419.

condition precedent.[29] Upon principle, however, it seems that such a condition should be given effect in the one case as in the other, and that to do so is in no sense to oust the jurisdiction of the court.[30]

In the case of mutual associations, such as mutual fire insurance companies and mutual benefit societies, stipulations in the by-laws have been sustained which require a member to submit a claim to arbitration or otherwise to exhaust the remedies provided, as a condition precedent to a resort to the courts;[31] and in some jurisdictions provisions have been sustained which make the decision of the arbitrators final and conclusive.[32]

Throckmorton Cas. Contracts, 251; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Smith v. Railroad Co., 36 N. H. 458; Hudson v. McCartney, 83 Wis. 331; Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504; Berry v. Carter, 19 Kan. 135; Reed v. Insurance Co., 138 Mass. 572; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Denver & N. O. Const. Co. v. Stout, 8 Colo. 61, 5 Pac. 627; Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Fisher v. Insurance Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; National Contracting Co. v. Water Power Co., 170 N. Y. 439, 63 N. E. 450. But see Phœnix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N. W. 736. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[29] See Stephenson v. Insurance Co., 54 Me. 55; Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389; Jones v. Brown, 171 Mass. 318, 50 N. E. 648; Mitchell v. Dougherty, 90 Fed. 639, 33 C. C. A. 205; J. G. Williams & Bro. v. Branning Mfg. Co., 154 N. C. 205, 70 S. E. 290; Home Ins. Co. v. Morse, 87 U. S. (20 Wall.) 445, 22 L. Ed. 365; Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058. See, also, cases cited, supra notes 27, 28. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[30] Scott v. Avery, 5 H. L. C. 811; Collins v. Locke, 4 App. Cas. 674; Spackman v. Plumstead Board of Works, 10 App. Cas. 229. See "Arbitration as a condition precedent," by Addison C. Barnham, 11 Harv. Law Rev. 234. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[31] Jeane v. Grand Lodge, 86 Me. 434, 30 Atl. 70; Smith v. Ocean Castle No. 11, 59 N. J. Law, 198, 35 Atl. 917; Whitty v. McCarthy, 20 R. I. 792, 36 Atl. 129; Myers v. Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613; Supreme Lodge of the Order of Select Friends v. Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

[32] Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 72 N. W. 254; Van Paucke v. Society, 63 Mich. 378, 29 N. W. 863. *See "Contracts," Dec. Dig. (Key-No.) § 127; Cent. Dig. §§ 608–615.*

SAME—ENCOURAGEMENT OF LITIGATION—CHAMPERTY AND MAINTENANCE

161. In most states an agreement amounting to maintenance or champerty is considered contrary to public policy because of its tendency to encourage litigation. In some states, however, the doctrine is scarcely recognized.

"Maintenance" is defined as the officious intermeddling in a suit by one who has no interest therein, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.[33] "Champerty" is defined as a bargain by a person with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit or defense at his own expense.[34] In other words, maintenance is an officious intermeddling in a lawsuit by a mere stranger, and the term is usually applied to cases where such intermeddling is without profit. Champerty is a species of maintenance, or "maintenance aggravated by an agreement to have a part of the thing in dispute."[35] Both champerty and maintenance were recognized as crimes at common law in England and are so recognized in many jurisdictions in the United States.[36] The tendency, however, has been toward a relaxation of the rules as to such transactions. In many jurisdictions neither maintenance nor champerty is recognized as a crime, but they are held to render agreements illegal on the ground of public policy; and in some states the doctrine is scarcely recognized at all.[37]

[33] 4 Bl. Comm. 134; 1 Hawk. P. C. 249.

[34] 4 Bl. Comm. 135; THOMPSON v. REYNOLDS, 73 Ill. 11, Throckmorton Cas. Contracts, 254; Smith v. Hartsell, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[35] 4 Bl. Comm. 135; 1 Hawk. P. C. 257; Torrence v. Shedd, 112 Ill. 466; Smith v. Hartsell, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[36] THOMPSON v. REYNOLDS, 73 Ill. 11, Throckmorton Cas. Contracts, 254. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 21.*

[37] Richardson v. Rowlind, 40 Conn. 565; Stoddard v. Mix, 14 Conn. 12; Brown v. Bigne, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752; Bayard v. McLane, 8 Har. (Del.) 139; Schamp v. Schenck, 40 N. J. Law, 195, 29 Am. Rep. 219; Hoffman v. Vallejo, 45 Cal. 564; Bentinck v. Franklin, 38 Tex. 458; Sherley v. Riggs, 11 Humph. (Tenn.) 53. The common law in relation to champerty has been virtually abolished or superseded by statute in several states. Wildey v. Crane, 63 Mich. 720, 30 N. W. 327; Heaton v. Dennis, 103 Tenn. 155, 52 S. W. 175; Potter v. Mining Co., 22 Utah, 273, 61

The rules as to champerty and maintenance were adopted in England in early times "in order to prevent great and powerful persons from enlisting in behalf of one party in a lawsuit, by which the opposite and feeble party would be oppressed and prevented from obtaining justice." [38] It has been said by English judges that, under the enlightened and impartial administration of justice in later times, the object of the law has ceased, and the law itself has become nearly obsolete.[39] So it has been said in America that, the law against maintenance was peculiar to early English society, and inapplicable to American society, and therefore that it would not exist here unless by statute enacted here.[40] In other jurisdictions, however, the doctrines as to champerty and maintenance have been held to be in force, except to the extent that they have been modified by statute. [41]

Maintenance

A contract is illegal and void on the ground of maintenance where a stranger to a cause of action agrees to sustain the expense of prosecuting or defending it.[42]

Illustrations of maintenance are where a stranger to a cause of action induces the person who has the right of action to sue by

Pac. 999. In New York it is abolished, except in so far as it is embodied in statutes in reference to certain cases affecting the title to lands, and prohibiting the purchase of claims by attorneys for the purpose of suing on them. See Bundy v. Newton, 65 Hun, 619, 19 N. Y. Supp. 734; Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169; Coughlin v. Railroad Co., 71 N. Y. 443, 27 Am. Rep. 75; Oisher v. Lazzarone, 61 Hun, 623, 15 N. Y. Supp. 933. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 21.*

[38] Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576. And see Smits v. Hogan, 35 Wash. 290, 77 Pac. 390, 1 Ann. Cas. 297. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[39] Findon v. Parker, 11 Mees. & W. 675. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[40] Smits v. Hogan, 35 Wash. 290, 77 Pac. 390, 1 Ann. Cas. 297. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–10.*

[41] THOMPSON v. REYNOLDS, 73 Ill. 11, Throckmorton Cas. Contracts, 254; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314, in which it is said, per Henry, J.: "The race of intermeddlers and busybodies is not extinct. It was never confined to Great Britain, and the little band of refugees who landed from the Mayflower on the coast of New England were not entirely free from the vice of intermeddling in the concerns of other people. It is as prevalent a vice in the United States as it ever was in England and we do not see but that a law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary, even in Missouri." *See "Champerty and Maintenance," Dec. Dig. (Key-No.) §§ 1–3; Cent. Dig. §§ 1–10.*

[42] Hutley v. Hutley, L. R. 8 Q. B. 112; Kerr v. Brunton, 24 U. C. Q. B. 390; Knox v. Martin, 8 N. H. 154. And see the cases in the following notes. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

promising to save him harmless from any liability for costs, or to pay the costs in case of failure in the action.[43] It has generally been deemed necessary, in order to avoid a contract, that there should be something vexatious in the maintenance, and that mere assistance was not enough; that maintenance "is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defenses which they have no right to make." [44] This is probably the general rule in this country where the doctrine of maintenance is recognized at all.[45]

It is not maintenance for a person to assist another in litigation, if he is himself interested in the subject of the litigation,[46] or if he in good faith believes that he is so interested,[47] or if he is a near relative of the litigant;[48] nor, it seems, for a person to assist one who has a good cause of action, and is too poor to sue.[49] He must assist, however, because of such interest or relationship.[50]

[43] Wheeler v. Pounds, 24 Ala. 472; Low v. Hutchinson, 37 Me. 196; Martin v. Amos, 35 N. C. 201. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[44] Findon v. Parker, 11 Mees. & W. 682. Cf. Bradlaugh v. Newdegate, 11 Q. B. Div. 10. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[45] See Perine v. Dunn, 3 Johns. Ch. (N. Y.) 508; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; McCall's Adm'r v. Capehart, 20 Ala. 521; Com. v. Dupuy, Brightly, N. P. (Pa.) 44. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[46] Williams v. Fowle, 132 Mass. 385; Knight v. Sawin, 6 Greenl. (Me.) 361; Inhabitants of Industry v. Inhabitants of Starks, 65 Me. 167; Hutley v. Hutley, L. R. 8 Q. B. 112; Board of Com'rs of Bartholomew County v. Jameson, 86 Ind. 154; Cooley v. Osborne, 50 Iowa, 526; Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576. It is not maintenance for several to contribute to the expense of a suit by one where all have a common interest in settling the question as to defendant's liability. Davies v. Stowell, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[47] Lewis v. Broun, 30 W. Va. 1, 14 S. E. 444; Wellington v. Kelly, 84 N. Y. 543; Findon v. Parker, 11 Mees. & W. 679. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[48] Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Gilleland v. Failing, 5 Denio (N. Y.) 308; Morris v. Henderson, 37 Miss. 492; Walker v. Perryman, 23 Ga. 309, at page 316; Jahn v. Champagne Lumber Co. (C. C.) 157 Fed. 407. See Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272. But see Barnes v. Strong, 54 N. C. 100; Hutley v. Hutley, L. R. 8 Q. B. 112. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[49] Dunne v. Herrick, 37 Ill. App. 180. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[50] Greenh. Pub. Pol. p. 401.

Champerty

Champerty, or the maintenance of a suit for a share of the proceeds, avoids an agreement made in contemplation of it.[51] A frequent instance of champerty is where an attorney agrees to conduct litigation, and pay the costs, in consideration of a certain part of whatever he may recover. Most of the courts hold such an agreement illegal.[52] Some courts have held that the champertor need not carry on the suit at his own expense, and that any contract is champertous in which an attorney agrees to conduct a suit for a compensation contingent on success;[53] but the weight of authority is to the contrary.[54]

An agreement is not champertous, however, which provides for

[51] Gilbert v. Holmes, 64 Ill. 548; Coleman v. Billings, 89 Ill. 183; Munday v. Whissenhunt, 90 N. C. 458; Slade v. Rhodes, 22 N. C. 24; Barnes v. Strong, 54 N. C. 100; Thompson v. Warren, 8 B. Mon. (Ky.) 488; Hayney v. Coyne, 10 Heisk. (Tenn.) 339; Jenkins v. Bradford, 59 Ala. 400; Martin v. Veeder, 20 Wis. 466; Barker v. Barker, 14 Wis. 131; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Stanley v. Jones, 7 Bing. 369; Sprye v. Porter, 7 El. & Bl. 81. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[52] THOMPSON v. REYNOLDS, 73 Ill. 11, Throckmorton Cas. Contracts, 254; Holloway v. Lowe, 7 Port. (Ala.) 488; Coughlin v. Railroad Co., 71 N. Y. 443, 27 Am. Rep. 75; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464; Boardman v. Thompson, 25 Iowa, 487; Evans v. Bell, 6 Dana (Ky.) 479; Million v. Ohnsorg, 10 Mo. App. 432; Scobey v. Ross, 13 Ind. 117; Lafferty v. Jelley, 22 Ind. 471; Hamilton v. Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811; Geer v. Frank, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110; In re Evans, 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794; Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212. It has even been held that, where the attorney has received money under such an agreement for his client, the latter cannot maintain an action to recover it. Best v. Strong, 2 Wend. (N. Y.) 319, 20 Am. Dec. 607. Contra, Ackert v. Barker, 131 Mass. 436; Stearns v. Felker, 28 Wis. 594. A contract whereby the client is bound not to settle without the consent of the attorney is void. Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; North Chicago St. R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294. See, also, Potter v. Mining Co., 22 Utah, 273, 61 Pac. 999. In Iowa a contract for a part of the sum recovered is not void, unless the client is forbidden to settle the claim. Barthell v. Chicago, etc., R. Co., 138 Iowa, 688, 116 N. W. 813. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[53] Lathrop v. President, etc., 9 Metc. (Mass.) 489; Ackert v. Barker, 131 Mass. 436. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[54] Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Phillips v. Commissioners, 119 Ill. 626, 10 N. E. 230; Winslow v. Railway Co., 71 Iowa, 197, 32 N. W. 330; Pittsburgh, C., C. & St. L. Ry. v. Volkert, 58 Ohio St. 362, 50 N. E. 924; Brush v. City of Carbondale, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121; Whinery v. Brown, 36 Ind. App. 276, 75 N. E. 605. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

the payment to the attorney of a sum equal to a certain portion of the amount recovered.[55] And it has been said that "where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or part of them, as security for the payment, the agreement is not champertous."[56] So an agreement by an attorney to prosecute or defend a suit is not champertous, if he has an interest in the suit aside from that acquired by the agreement.[57] In this case he is not an intermeddler.

A less obvious form of champerty is in the case of a purchase out and out of a right of action. The validity of such an agreement would depend on whether the purchase included any substantial interest beyond a mere right to litigate. If property is bought to which a right to sue attaches, that fact will not avoid the contract,[58] but an agreement to purchase a bare right to sue would not be sustained.[59] "It is not unlawful to purchase an interest in property, though adverse claims exist which make litigation necessary for realizing that interest, but it is unlawful to purchase an interest merely for the purpose of litigation; in other words, the sale of an

[55] Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760; Sparling v. United States Sugar Co., 136 Wis. 509, 117 N. W. 1055. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[56] Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99. See, also, McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009. Contra, Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456. The rules governing champerty are not applicable to the prosecution of a claim otherwise than by suit. Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L. R. A. 516, 12 Am. St. Rep. 508 (court of commissioners of Alabama claims). See, also, Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[57] Smith v. Hartsell, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[58] Dickinson v. Burrell, 1 Eq. 337, 342. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 5–8.*

[59] Prosser v. Edmonds, 1 Younge & C. 499; Norton v. Tuttle, 60 Ill. 130; Brush v. Sweet, 38 Mich. 574; Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931; Storrs v. Hospital, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; Milwaukee & M. R. Co. v. Railroad Co., 20 Wis. 174, 88 Am. Dec. 740; Archer v. Freeman, 124 Cal. 528, 57 Pac. 474; Haseltine v. Smith, 154 Mo. 404, 55 S. W. 633; Miles v. Association, 108 Wis. 421, 84 N. W. 159. See Greenhood, Pub. Pol. pp. 409–411. Conveyance of land held adversely by another. Smith v. Price (Ky.) 7 S. W. 918; Combs v. McQuinn (Ky.) 9 S. W. 495; Nelson v. Brush, 22 Fla. 374; Snyder v. Church, 70 Hun, 428, 24 N. Y. Supp. 337. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 5–8.*

interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad." [60]

As we have stated above, it is not regarded as maintenance for a near relative to assist a person in litigation. This rule, however, does not apply to champerty. Not even a relative can assist for a share of the recovery. "Lineal kinship in the first degree, or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which, as between strangers, would be maintenance; but blood relationship will not justify champerty." [61]

It should be noted that the defense of champerty or maintenance cannot be set up to defeat a recovery on the cause of action to which the illegal agreement relates. It can only be set up against the enforcement of the illegal agreement itself.[62]

In some jurisdictions, the rule prevails that, although the contract of an attorney is void for champerty, he may recover upon a quantum meruit the reasonable value of his services.[63] Upon principle, however, and by the weight of authority, if the contract is itself void for champerty, there can be no recovery upon a quantum meruit or otherwise for the services rendered in pursuance of the contract.[64] As to services performed before the making of the

[60] Pol. Cont. (3d Ed.) 315.

[61] Pol. Cont. (3d Ed.) 320; Hutley v. Hutley, L. R. 8 Q. B. 112; In re Evans, 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 4–19.*

[62] Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Whitney v. Kirtland, 27 N. J. Eq. 333; Hilton v. Woods, L. R. 4 Eq. 432; Courtright v. Burnes (C. C.) 13 Fed. 817; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785; Small v. Railroad Co., 55 Iowa, 583, 8 N. W. 437; Chamberlain v. Grimes, 42 Neb. 701, 60 N. W. 948; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; Potter v. Mining Co., 22 Utah, 273, 61 Pac. 999; Ellis v. Smith, 112 Ga. 480, 37 S. E. 739; Elser v. Village of Gross Point, 223 Ill. 230, 79 N. E. 27, 114 Am. St. Rep. 326. Contra, Barker v. Barker, 14 Wis. 131; Allard v. Lamirande, 29 Wis. 502; Heaton v. Dennis, 103 Tenn. 155, 52 S. W. 175; Miles v. Association, 108 Wis. 421, 84 N. W. 159. See, also, The Clara A. McIntyre (D. C.) 94 Fed. 552 (distinguishing Burnes v. Scott, supra, on ground that here suit was in name of champertor to whom note and mortgage had been assigned). *See "Champerty and Maintenance" Dec. Dig. (Key-No.) §§ 4–6; Cent. Dig. §§ 4–51.*

[63] Brush v. City of Carbondale, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121; Stearns v. Felker, 28 Wis. 594. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[64] Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206; Mazureau & Hennis v. Morgan, 25 La. Ann. 281; Butler v. Legro, 62 N. H. 350, 13 Am. St. Rep. 573; Roller v. Murray, 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913B, 1088 [cit. Clark on Contracts, 1st Ed. § 134], in which it is said, per Buchanan, J.: "To permit

contract, it is agreed that the attorney may recover their reasonable value.[66]

SAME—AGREEMENTS OF IMMORAL TENDENCY

162. Any agreement which is contrary to established rules of decency and morality is contrary to public policy.

Agreements which are contrary to established rules of decency and morality, though the acts to which they tend may not be prohibited in the sense of rendering the doer liable to a penalty,[66] will not be enforced. Unlawful sexual intercourse is not a crime at common law unless it is open and notorious, but any unlawful sexual intercourse is contra bonos mores. A promise, therefore, given in consideration of present or future illicit cohabitation or intercourse, is void;[67] and it is immaterial, in such case, whether the contract is by parol or under seal, for, as we have seen, though no consideration is necessary to support a promise under seal, yet, if there is a consideration, its illegality will avoid the contract.[68] A contract, however, for services to be rendered by a woman to a man as housekeeper and servant, is valid if not made in contemplation of illicit relations, although the parties actually

a recovery upon a quantum meruit, instead of discouraging, would encourage, the making of such contracts; for, if the client kept and performed his unlawful agreement, the attorney would get the benefit of it, and, if he did not, the attorney would suffer no loss, since he could recover upon the quantum meruit all that his services were worth." *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[65] Dreyfuss, Weil & Co. v. Jones, 116 Ill. App. 75; Thurston v. Percival, 1 Pick. (Mass.) 415. *See "Champerty and Maintenance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 24–51.*

[66] A policy obtained by one on his own life, payable to himself, his executors, administrators, or assigns, which is silent on the subject of suicide, becomes void if the insured commits suicide when sane, both from the presumed intention of the parties and from principles of public policy. Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[67] Ayerst v. Jenkins, 16 Eq. 275; Wallace v. Rappleye, 103 Ill. 229; Walker v. Perkins, 3 Burrows, 1568; Baldy v. Stratton, 11 Pa. 316; Massey v. Wallace, 32 S. C. 149, 10 S. E. 937; Drennan v. Douglas, 102 Ill. 341, 40 Am. Rep. 595; Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Forsythe v. State, 6 Ohio, 20; Walker v. Gregory, 36 Ala. 180; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; Goodall v. Thurman, 1 Head. (Tenn.) 209; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[68] See ante, p. 72.

lived in a state of concubinage,[69] and a fortiori where the relations of the parties were at all times moral and proper.[70]

A promise made in consideration of past illicit cohabitation is not generally held to be made on an illegal consideration, but is a mere gratuitous promise, because the consideration is past, and is not enforceable if made by parol, though it is binding if made under seal.[71] A contract, however, by a man to support a woman and their illegitimate offspring if she will refrain from resort to bastardy proceedings is not contrary to public policy nor without consideration;[72] and this is true although the illicit cohabitation continues, if there is no stipulation for future cohabitation.[73] It has been held that, if the past illicit cohabitation was accompanied by seduction, there is sufficient consideration to support a parol promise;[74] but this is contrary to the well-settled doctrine that a moral obligation is no consideration for a promise, and the weight of authority is the other way.[75]

Where the liquor traffic is not forbidden by law, a contract in relation thereto is not void as opposed to sound morals or public policy.[76]

An agreement may be innocent in itself, but may be intended to further an immoral purpose. The effect of such agreements will be considered later.[77]

[69] Emmerson v. Botkin, 26 Okl. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; Lytle v. Newell (Ky.) 68 S. W. 118; Rhodes v. Stone, 63 Hun, 624, 17 N. Y. Supp. 561; Cooper v. Cooper, 147 Mass. 372, 17 N. E. 892, 9 Am. St. Rep. 721. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[70] Goff v. Supreme Lodge Royal Achates, 90 Neb. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[71] Gray v. Mathias, 5 Ves. 286; Beaumont v. Reeve, 8 Q. B. 483; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; Brown v. Kinsey, 81 N. C. 245; Massey v. Wallace, 82 S. C. 149, 10 S. E. 937; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Wyant v. Lesher, 23 Pa. 338. But see Wallace v. Rappleye, 103 Ill. 229, at page 249; McDonald v. Fleming, 12 B. Mon. (Ky.) 285. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–513.*

[72] Burton v. Belvin, 142 N. C. 151, 55 S. E. 71. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[73] Burton v. Belvin, supra. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[74] Smith v. Richards, 29 Conn. 232; Shenk v. Mingle, 13 Serg. & R. (Pa.) 29. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[75] Ante, p. 136, 175.

[76] Mitchell v. Branham, 104 Mo. App. 480, 79 S. W. 739. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[77] Post, p. 412.

SAME—AGREEMENTS TENDING TO FRAUD AND BREACH OF TRUST

163. Any agreement which has a direct tendency to induce a person to commit a fraud upon the rights of others, or a breach of trust and confidence, is illegal as being contrary to public policy.

"Contracts," it has been said, "which are opposed to open, upright, and fair dealings, are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. * * * The law will not only avoid contracts, the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons."[78] Although the act contracted to be done "may be just and beneficial as between the parties immediately concerned in it, and though it be accomplished in good faith and without undue means, yet the contract to procure to be done is held to be against

[78] Greenh. Pub. Pol. 294; Edwards v. Estell, 48 Cal. 194; Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442; Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Rice v. Williams (C. C.) 32 Fed. 437; Gleason v. Railroad Co. (Iowa) 43 N. W. 517; Smith v. Humphreys, 88 Me. 345, 34 Atl. 166; Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906; McClure v. Ullmann, 102 Mo. App. 697, 77 S. W. 325; Smith v. David B. Crockett Co., 85 Conn. 282, 82 Atl. 569, 39 L. R. A. (N. S.) 1148, in which "graft" is defined by Hall, C. J., as "the receiving of personal gain without rendering compensatory services, by persons holding positions of trust and confidence, and * * * but a form of bribery." A good illustration of such an agreement is where a broker employed to sell property is also employed by the person to whom he sells to buy, thus to receive a commission from both parties. Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Everhart v. Searle, 71 Pa. 256. And see Holcomb v. Weaver, 136 Mass. 265. So, also, where a broker is employed to sell land, an agreement with a person who wishes to buy, by which the broker is to introduce him to the principal, and receive part of the land when purchased, is void. Smith v. Townsend, 109 Mass. 500. An agreement between real-estate agents representing different principals to divide commissions in case they effect sale is void. LEVY v. SPENCER, 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303, Throckmorton Cas. Contracts, 259; Howard v. Murphy, 70 N. J. Law, 141, 56 Atl. 143, 1 Ann. Cas. 571. See Tiffany, Ag. 415 et seq. An agreement by a client releasing his attorney from all the duties of the relationship is void. In re Boone (C. C.) 83 Fed. 944. A stipulation in a contract that false representations used in procuring it shall not affect its validity is itself invalid. Hoffiin v. Moss, 67 Fed. 440, 14 C. C. A. 459. *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–541.*

public policy, because its natural effect is to cause the party to abuse the confidence placed in him, * * * and thereby prejudicially to affect the rights of others."[79] In accordance with this principle, a contract by a guardian, trustee, or other fiduciary to resign his trust is void.[80] "A trustee may not make use of his relations as such for personal emolument. * * * He may voluntarily resign for reasons not mercenary in character, but has no right to traffic in or make merchandise of the confidence reposed in him."[81] So a contract by which a fiduciary deprives himself of the control of funds intrusted to him is void.[82]

A contract by a stockholder in a corporation to vote his stock in a particular way,[83] or by one owning a majority of the stock in a corporation to sell all the corporate property without the consent of the minority stockholders is void.[84] The same is true, also, of a contract by an officer of a corporation that he will use his

[79] Spinks v. Davis, 32 Miss. 152. See, also, Harrington v. Dock Co., 3 Q. B. Div. 549; Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385. The rule does not apply to a case in which a broker is acting as agent of both parties with their knowledge. Greenhood, Pub. Pol. rule 262; Shaw v. Andrews, 9 Cal. 73; Pugsley v. Murray, 4 E. D. Smith (N. Y.) 245; Bonwell v. Howes (City Ct. N. Y.) 1 N. Y. Supp. 435; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528. *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–541.*

[80] Cunningham v. Cunningham, 18 B. Mon. (Ky.) 24, 68 Am. Dec. 718 (guardian); Ellicot v. Chamberlain, 38 N. J. Eq. 604, 48 Am. Rep. 327 (executor); Currier v. Clark, 19 Colo. App. 250, 75 Pac. 927 (executor). *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–541.*

[81] Aughey v. Windrem, 137 Iowa, 315, 114 N. W. 1047, per Ladd, C. J. *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–541.*

[82] Fidelity & Deposit Co. of Md. v. Butler, 130 Ga. 225, 60 S. E. 851, 16 L. R. A. (N. S.) 994 (contract of guardian to deposit ward's money in bank and not to draw it out except upon the joint check of himself and surety). *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–541.*

[83] Keady v. United Rys. Co., 57 Or. 325, 100 Pac. 658, 108 Pac. 197, holding, however, that the contract will be valid if all persons interested have knowledge of it and expressly or impliedly assent to it. Contracts for the establishment of a "voting trust," by which stockholders agree that the trustees named shall have power to vote the stock if parties to the agreement have been held void in some states, on the ground that a contract which separates the beneficial ownership of corporate stock from its legal title and control is contrary to public policy. Morel v. Hoge, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773; Bridgers v. First Nat. Bank, 152 N. C. 293, 67 S. E. 770, 31 L. R. A. (N. S.) 1199; Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 S. E. 894. But in other cases such agreements have been sustained. Gray v. Bloomington & N. Ry., 120 Ill. App. 159; Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890. *See "Contracts," Dec. Dig. (Key-No.) § 121; Cent. Dig. § 504.*

[84] Bias v. Atkinson, 64 W. Va. 486, 63 S. E. 395. *See "Contracts," Dec. Dig. (Key-No.) § 121; Cent. Dig. § 504.*

influence to retain another in office at a fixed salary,[85] or for any other use of his position and influence that might interfere with his duty to the stockholders.[86]

The courts have even gone so far as to hold void any contract that has for its object the practice of deception upon a third person or the taking advantage of confidential relations with him to draw him into a bargain by which the person undertaking to use his influence will secretly receive a benefit from the other party to the contract.[87]

It is impossible to go further into the various rules growing out of this principle. They have been admirably stated, and the illustrations and authorities collected, by Greenhood in his work on Public Policy.[88]

SAME—AGREEMENTS IN DEROGATION OF THE MARRIAGE RELATION

164. As a general rule, any agreement which restrains the freedom of parties to marry, or the freedom of choice in marrying, or impairs the sanctity and security of the marriage relation, or is otherwise in derogation of such relation, is contrary to public policy.

Agreements which restrain the freedom of marriage are discouraged on political and social grounds, as injurious to the increase of population and the moral welfare of the citizen. Agreements not to marry are therefore void. A promise to marry

[85] West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557. *See "Contracts," Dec. Dig. (Key-No.) § 121; Cent. Dig. § 504.*

[86] Willbur v. Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Attaway v. Bank, 93 Mo. 485, 5 S. W. 16; Lum v. McEwen, 56 Minn. 278, 57 N. W. 662; Guernsey v. Cook, 120 Mass. 501; Dickson v. Kittson, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447; Sauerhering v. Reuping, 119 N. W. 184, 137 Wis. 407. Contract by officer of corporation for purchase by him of claim against the corporation. McDonald v. Haughton, 70 N. C. 393. Contract by officer of railroad company to locate a station at a particular place or to build the road to a certain point in consideration of benefit to himself. Peckham v. Lane, 81 Kan. 489, 106 Pac. 464, 25 L. R. A. (N. S.) 967, 19 Ann. Cas. 369; McGuffin v. Coyle, 16 Okl. 648, 85 Pac. 954, 86 Pac. 962, 6 L. R. A. (N. S.) 524. *See "Contracts," Dec. Dig. (Key-No.) §§ 113, 121; Cent. Dig. §§ 504, 521–541.*

[87] Simon v. Garlitz (Tex. Civ. App.) 133 S. W. 461; Torpey v. Murray, 93 Minn. 482, 101 N. W. 600; Standard Lumber Co. v. Butler Ice Co., 146 Fed. 359, 76 C. C. A. 639, 7 L. R. A. (N. S.) 467. *See "Contracts," Dec. Dig. (Key-No.) § 113; Cent. Dig. §§ 521–541.*

[88] Greenh. Pub. Pol. pp. 292–326.

no one but the promisee, for instance, on penalty of paying her a certain sum, has been held void because there was no promise of marriage on either side, and the agreement was purely restrictive.[89] So, also, a wager in which one man bet another that he would not marry within a certain time was held void, as giving to one of the parties a pecuniary interest in not marrying.[90] A contract between two persons to prevent the marriage of a third is illegal, as tending to break up contemplated marriages and to lead to "slander and other illegitimate practices injurious and detrimental to the well-being of the community and of the public generally."[91] It has been said, however, that "the general rule that contracts in restraint of marriage are void has no application to second marriages;"[92] and contracts providing for the payment to a surviving or divorced spouse of a certain income so long as he or she remains unmarried have been sustained.[93]

Contracts restraining the freedom of choice in entering into a marriage, such as marriage brocage contracts, or promises made upon consideration of the procuring or bringing about of a marriage, are held illegal on social grounds.[94] Such a contract is void, although it is merely to hasten an intended marriage[95] or to bring about a marriage of parties already engaged.[96]

[89] Lowe v. Peers, 4 Burrows, 2225. See Hogan v. Curtin, 88 N. Y. 162, 42 Am. Rep. 244. Where a contract to care for another during his life, and not to marry, is performed, it will be enforced, notwithstanding that the promise not to marry is void. King v. King, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[90] Hartley v. Rice, 10 East, 22. And see Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586; James v. Jellison, 94 Ind. 202, 48 Am. Rep. 151; Sterling v. Sinnickson, 5 N. J. Law, 756; Bostick v. Blades, 59 Md. 231, 43 Am. Rep. 548. But see Shafer v. Senseman, 125 Pa. 310, 17 Atl. 350. *See "Gaming," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 5–15.*

[91] Sheppey v. Stevens (C. C.) 177 Fed. 484. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[92] In re Appleby's Estate, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. Rep. 709, 10 Ann. Cas. 563. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[93] In re Appleby's Estate, supra; Jones v. Jones, 1 Colo. App. 28, 27 Pac. 85. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[94] Arundel v. Trevillian, Rep. Ch. 47; Crawford v. Russell, 62 Barb. (N. Y.) 92; Duval v. Wellman (Com. Pl. N. Y.) 1 N. Y. Supp. 70; Id., 124 N. Y. 156, 26 N. E. 343; Johnson's Adm'r v. Hunt, 81 Ky. 321; Wenninger v. Mitchell, 139 Mo. App. 420, 122 S. W. 1130; Hermann v. Charlesworth, [1905] 2 K. B. 123, 74 L. J. K. B. 620, 93 Law T. 284, 54 Wkly. Rep. 22, 21 Times Law R. 368. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[95] Jangraw v. Perkins, 76 Vt. 127, 56 Atl. 532, 104 Am. St. Rep. 917. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[96] MORRISON v. ROGERS, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95,

Agreements are also contrary to public policy if they directly tend to disturb or prejudice the status of a lawful marriage after it has been entered into. Agreements for separation of husband and wife are valid if made in prospect of an immediate separation;[87] but if they provide for a possible separation in the future they are illegal, and it is immaterial whether they are made before or after marriage, because they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest."[88] "An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact became inevitable. * * * To allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves."[89]

To obtain a divorce by collusion is not only an evasion of justice, but is contrary to public policy, as being in derogation of the marriage relation; and any agreement, therefore, between husband and wife, in consideration of one of them withdrawing or not making opposition to a suit for divorce brought by the other, is void. This applies to any agreement intended to facilitate the procuring of a divorce.[1] The common-law rule as to the inability of a married

Throckmorton Cas. Contracts, 263. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[87] Hunt v. Hunt, 4 De Gex, F. & J. 221; Fox v. Davis, 113 Mass. 255, 18 Am. Rep. 476; Brown v. Brown, 5 Gill (Md.) 249; Jenkins v. Hall, 26 Or. 79, 37 Pac. 62; Walker v. Walker, 9 Wall. 743, 19 L. Ed. 814; Helms v. Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Wells v. Stout, 9 Cal. 479; Com. v. Richards, 131 Pa. 209, 18 Atl. 1007; Rains v. Wheeler, 76 Tex. 390, 13 S. W. 324; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733; Carey v. Mackey, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500; Grime v. Borden, 166 Mass. 198, 44 N. E. 216. Contra, Baum v. Baum, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. Rep. 854; Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554. Cf. Boland v. O'Neil, 72 Conn. 217, 44 Atl. 15; Bailey v. Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427. But agreement may be set aside if not fair to the wife. McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1094. *See "Husband and Wife," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1046–1053; "Contracts," Cent. Dig. §§ 515, 517.*

[88] Cartwright v. Cartwright, 3 De Gex, M. & G. 982; Westmeath v. Westmeath, 1 Dow. & C. 519; Randall v. Randall, 37 Mich. 563; Brun v. Brun, 64 Neb. 782, 90 N. W. 860; Perevia v. Perevia, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. And see cases in preceding note. *See "Husband and Wife," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1046–1053; "Contracts," Cent. Dig. §§ 515, 517.*

[89] Pol. Cont. (3d Ed.) 286.

[1] Besant v. Wood, 12 Ch. Div. 623; Hamilton v. Hamilton, 89 Ill. 349; Stoutenburg v. Lybrand, 13 Ohio St. 228; Muckenburg v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Wilde v. Wilde, 37 Neb. 891, 56 N. W. 724; Comstock v.

woman to contract has been so far modified in most jurisdictions as to enable her to make a valid contract for the services of an attorney in a divorce suit,[2] and in the absence of an express contract she is liable for the reasonable value of the attorney's services;[3] but a contract by which the attorney is to receive a portion of the alimony recovered is void, as giving him an interest in the dissolution of the marriage.[4]

On the other hand, a contract made by a wife who is living apart from her husband, whether made with him [5] or with a third party,[6] by which she agrees to a restoration of marital relations with her husband, is in accordance with a sound public policy and is valid.

It has also been held that contracts between husband and wife

Adams, 23 Kan. 513, 33 Am. Rep. 191; Viser v. Bertrand, 14 Ark. 267; Adams v. Adams, 25 Minn. 72; Stokes v. Anderson, 118 Ind. 533, 21 N. E. 831, 4 L. R. A. 313; Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; Davis v. Hinman, 73 Neb. 850, 103 N. W. 668, 9 Ann. Cas. 376; Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465. An agreement between a man and his wife, made the day after he has been awarded a decree of divorce, to pay an annuity if she will not move for new trial, is void. Blank v. Nohl (Mo.) 19 S. W. 65; Id., 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 850. Contract by wife not to sue for alimony for a year is void. Evans v. Evans, 93 Ky. 510, 20 S. W. 605. If the promisee is ignorant of the fact that the promisor is already married, she may maintain an action against him for breach of his promise. See Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Haviland v. Halstead, 34 N. Y. 643; Cammerer v. Muller, 60 Hun, 578, 14 N. Y. Supp. 511; Id., 133 N. Y. 623, 30 N. E. 1147; Kerns v. Hagenbuchle (Super. N. Y.) 17 N. Y. Supp. 367. Promise to marry on death of divorced wife held valid. Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914. Contract for payment of a certain sum to attorney and detective contingent upon procuring a divorce is void. Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 200. But a promise by the husband, after decree of divorce is granted, to pay his wife a certain sum in lieu of his obligation of support, is valid. Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794, 35 L. R. A. (N. S.) 1167. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[2] Wolcott v. Patterson, 100 Mich. 227, 58 N. W. 1006, 24 L. R. A. 629, 43 Am. St. Rep. 456. *See "Husband and Wife," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 322, 324.*

[3] McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746. *See "Husband and Wife," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 322, 324.*

[4] McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1094. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[5] Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675; Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227. Contra, Merrill v. Peaslee, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334 (Holmes, Knowlton, and C. Allen, JJ., dissenting). *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[6] Mack v. Mack, 87 Neb. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

regulating their duties and conduct in matters pertaining directly and exclusively to the home cannot be made the subject of public inquiry, and that it is contrary to public policy to recognize and enforce them.[7]

SAME—AGREEMENTS IN DEROGATION OF PARENTAL RELATION

165. A contract whereby a father deprives himself of the custody of his child is contrary to public policy.

Parental Relation

A contract by a father for relinquishment of the right to the custody of his child is void as against public policy.[8] The trust is personal to the father, and he has no right to dispose of the child to another. Such contracts, however, when carried out, may have the indirect effect of preventing the father from asserting his rights, if the interests of the child so require.[9]

SAME—AGREEMENTS IN RESTRAINT OF TRADE

166. Any agreement which unreasonably restrains a person from exercising his trade or business is contrary to public policy.

167. A restraint is not unreasonable if it is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.

[7] A contract between husband and wife to drop matters in dispute, refrain from scolding, fault-finding, and anger, and live together as husband and wife; that the wife should keep her home in a comfortable condition; and that the husband provide necessary expenses, and pay the wife a certain sum per month, held illegal. Miller v. Miller, 78 Iowa, 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431. *See "Contracts," Dec. Dig. (Key-No.) § 111; Cent. Dig. §§ 515–520.*

[8] State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397; People v. Mercein, 3 Hill (N. Y.) 410, 38 Am. Dec. 644; Brooke v. Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; Hibbette v. Baines, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839. Cf. Enders v. Enders, 164 Pa. 266, 30 Atl. 129, 27 L. R. A. 56, 44 Am. St. Rep. 598. *See "Parent and Child," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 4–32.*

[9] See Tiffany, Pers. & Dom. Rel. 253–255.

168. It was formerly thought, and is still held in some jurisdictions, that though the restraint might be unlimited as to time, it could not be unlimited as to space; but modern decisions hold that such a restraint is not invalid, if it is reasonable.

169. Within this class are combinations and agreements tending to prevent competition, enhance prices, and create monopolies, but they had best be treated separately.

A contract in unreasonable restraint of trade is contrary to public policy and void. "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. * * * (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly.[10] Public policy requires, however, that the freedom of persons to enter into contracts shall not be lightly interfered with. Some restraint of trade, therefore, must be permitted, but we shall see that it must not be unreasonable.

At one time in England it was considered that a contract was contrary to public policy if it placed any restraint at all on a man's right to exercise his trade or calling. Gradually, however, exceptions were recognized, until in 1711 the court, in a leading case, established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good; "that wherever a sufficient consideration appears to make it a proper and useful contract,[11] and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, but with this constant diversity, viz., where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be

[10] Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[11] A contract in restraint of trade must be based on a sufficient consideration. Ante, p. 143. See Chapin v. Brown, 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; Cleaver v. Lenhart, 182 Pa. 285, 37 Atl. 811. And see Urmston v. Whitelegg, 68 Law T. 455. *See "Contracts," Dec. Dig. (Key-No.) § 62; Cent. Dig. § 263.*

void, being of no benefit to either party, and only oppressive." [12] Although in that case the restraint was limited both as to time and space, so that it did not call for a decision on a contract in general restraint of trade, it has since been assumed in numerous cases, and in some directly decided, that a contract which imposes a restraint which is unlimited as to space is void on its face.[13] In England the law is now settled that a restraint, although unlimited as to space, is valid, if, under the particular circumstances, it is reasonable.[14] Some diversity of opinion exists, however, among the courts of this country.[15]

In determining whether a particular restraint is reasonable, the court will consider the nature and extent of the trade or business, the situation of the parties, and all the other circumstances. If, on such a consideration, the restraint seems unreasonable, the contract will be declared void, however partial the restraint may be. As said in a leading case, the court will consider "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy." [16]

To illustrate this rule, a retail merchant, a mechanic, or a professional man, whose trade or business does not extend beyond the limits of the city in which he does business, or the immediate neighborhood, may, on selling his business, bind himself not to engage in the same business in that city or neighborhood. This is clearly necessary to protect the interests of the other party.[17] On the

[12] Mitchel v. Reynolds, 1 P. Wms. 181, 1 Sm. Lead. Cas. 694. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[13] Post, p. 388. [14] Post, p. 389. [15] Post, p. 389.

[16] Horner v. Graves, 7 Bing. 735. See, also, Rousillon v. Rousillon, 14 Ch. Div. 358; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 83 Am. St. Rep. 850; Keeler v. Taylor, 53 Pa. 467, 91 Am. Dec. 221; Arnold v. Kreutzer, 67 Iowa, 214, 25 N. W. 138; Ellerman v. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Gill v. Ferris, 82 Mo. 156; Tecktonius v. Scott, 110 Wis. 441, 86 N. W. 672; Harrison v. Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; Fisheries Co. v. Lennen (C. C.) 116 Fed. 217; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Trentman v. Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057. Injury to the interests of the public is always to be taken into consideration. See Western Wooden-Ware Ass'n v. Starkey, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[17] Washburn v. Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; Dwight v. Hamilton, 113 Mass. 175; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654;

other hand, it could only oppress him, and could not benefit the other party, to uphold a promise not to engage in the same business anywhere in the state, and such a promise would be unreasonable and void.[18] We can even imagine cases in which an agreement by a person, on selling his business, not to engage in the same business in the same city, would be unreasonable; as, for instance, in case of a small bakery in a large city, the trade of which is only in the vicinity of the shop. Again, a wholesale merchant selling only in a particular section of the country could not, on selling his business, bind himself not to engage in the same business anywhere in the United States, though the restriction would be valid if limited to the district covered by his trade, even though it might extend over several states.[19] The business of some wholesale houses extends over the entire United States, and even further; and the courts, as we shall see, show a tendency in some of the modern cases to allow a restriction coextensive with the business. Other courts, however, looking upon the restraint as general, hold it void on its face for that reason alone, without regard to what the interests of the other party may require.

A contract between manufacturers or dealers, not incidental to a sale of the business, to refrain from selling or competing, tending, as it does, to destroy competition, and not being necessary for the

Linn v. Sigsbee, 67 Ill. 75; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634; Smith v. Leady, 47 Ill. App. 441; McClurg's Appeal, 58 Pa. 51; Boutelle v. Smith, 116 Mass. 111. An agreement not to sell a particular line of goods in a certain town may be valid, Clark v. Crosby, 37 Vt. 188; or not to sell to anybody in certain town or state except promisee, Newell v. Meyendorff, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738; Roller v. Ott, 14 Kan. 609; Keith v. Optical Co., 48 Ark. 138, 2 S. W. 777. The following agreements have been held a reasonable restraint: Covenant in deed not to sell intoxicating liquors on premises in less quantities than five gallons, Sutton v. Head, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; or not to carry on trading or mercantile business thereon, Morris v. Manufacturing Co., 83 Ala. 565, 3 South. 689. Agreement by vendee of land not to sell sand from it. Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. Not to manufacture ochre in certain county. Smith's Appeal, 113 Pa. 579, 6 Atl. 251. Not to use premises sold for hotel Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 824. Covenant by lessee not to sell any beer on premises except that made by a certain company. Ferris v. Brewing Co., 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[18] See Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[19] See DIAMOND MATCH CO. v. ROEBER, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, Throckmorton Cas. Contracts, 264. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

protection of the promisee, has been held unreasonable and void.[20] Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful if not necessary to at least a considerable portion of the local public, as to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unreasonable, and consequently an unlawful, restraint of trade." [21]

Restraint Unlimited as to Space

As we have already stated, it was for a long time thought, both in England and with us, that a contract in restraint of trade was void on its face if the restraint was unlimited as to space, and there are modern cases laying down the same rule. [22]

[20] Fox Solid Pressed Steel Co. v. Schoen (C. C.) 77 Fed. 29; Clark v. Needham, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559; Culp v. Love, 127 N. C. 457, 37 S. E. 476. Contra, Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357. And see Oakes v. Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[21] Stewart v. Stearns & Culver Lumber Co., 56 Fla. 570, 48 South. 19, 24 L. R. A. (N. S.) 649, per Whitfield, J. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[22] Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119; BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, Throckmorton Cas. Contracts, 290; Dean v. Emerson, 102 Mass. 480; Thomas v. Miles' Adm'r, 3 Ohio St. 274; Long v. Towl, 42 Mo. 545, 97 Am. Dec. 355; Peltz v. Eichele, 62 Mo. 171; Sutton v. Head, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; Smith's Appeal, 113 Pa. 579, 6 Atl. 251; Warfield v. Booth, 33 Md. 63; Goodman v. Henderson, 58 Ga. 567; Lufkin Rule Co. v. Fringeli, 57 Ohio St. 590, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736; Harding v. Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189 (cf. Lanzit v. Manufacturing Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171); Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346. See, also, Gamewell Fire Alarm Telegraph Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, 39 Am. St. Rep. 458. It was at one time considered that an agreement not to carry on a business anywhere within a state, like an agreement not to carry it on anywhere within the United States, was unlimited as to space, and was invalid as imposing a general restraint, Taylor v. Blanchard, 13 Allen (Mass.) 370, 90 Am. Dec. 203; Chappel v. Brockway, 21 Wend. (N. Y.) 157; Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Nobles v. Bates, 7 Cow. (N. Y.) 307; but this doctrine is now generally repudiated, and such an agreement will be enforced, if, under the circumstances, the restraint is reasonable. Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315; Beal v. Chase, 31 Mich. 490; DIAMOND MATCH CO. v. ROEBER, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, Throckmorton Cas. Contracts, 264, affirming 35 Hun (N. Y.) 421; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

The tendency of the cases is, however, to relax the old rule, and to allow a restraint unlimited in space if it is reasonable, and no broader than is necessary for the protection of the covenantee. Such is the doctrine which is now established in England.[23] Thus, in a recent case,[24] where a patentee and manufacturer of guns and ammunition covenanted with a company to which his patents and business had been transferred not to engage, for twenty-five years, in the business of manufacturing guns and ammunition, it was held that the covenant was not in restrain of trade. "The inquiry as to the validity of all covenants in restraint of trade," said Lord Ashborne, "must now ultimately turn upon whether they are reasonable, and whether they exceed what is reasonably necessary for the covenantee." In this country, also, the tendency of the modern cases is to support a restraint, although unlimited in space, provided it is reasonably necessary for the protection of the promisee.[25]

Restraint Unlimited as to Time

It has been said without qualification that, if the restraint is reasonably limited as to space, the fact that it is unlimited as to time will not render the agreement void; that, for instance, an agreement not to carry on a trade, business, or profession in a certain city is valid, though it may be agreed that it shall never be carried on there.[26] It is clear, however, that the same

[23] Rousillon v. Rousillon, 14 Ch. Div. 351; Badische Anilin und Soda Fabrik v. Schott, [1892] 3 Ch. 447; Nordenfelt v. Maxim-Nordenfelt Co., [1894] App. Cas. 535; Underwood v. Barker, [1899] 1 Ch. 300. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[24] Nordenfelt v. Maxim-Nordenfelt Co., [1894] App. Cas. 535. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[25] DIAMOND MATCH CO. v. ROEBER, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, Throckmorton Cas. Contracts, 264; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850; National Ben. Co. v. Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; Gibbs v. Gas Co., 130 U. S. 409, 9 Sup. Ct. 553, 32 L. Ed. 979; Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; Carter v. Alling (C. C.) 43 Fed. 208; Richards v. Seating Co., 87 Wis. 503, 58 N. W. 787; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Buck v. Coward, 122 Mich. 530, 81 N. W. 328; National Enameling & Stamping Co. v. Haberman (C. C.) 120 Fed. 415; United Shoe Machinery Co. v. Kimball, 193 Mass. 351, 79 N. E. 790. See "Contracts in Restraint of Trade," by Amasa M. Eaton, 4 Harv. Law Rev. 128. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[26] Bowser v. Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93; Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Cook v. Johnson, 47 Conn. 175, 36

considerations apply as in the case of a restraint unlimited in space. A restraint unlimited as to time may be necessary to protect the party in whose favor it is imposed, and in such a case it will be upheld; but, if unnecessary, the agreement cannot be sustained.[27]

In a leading English case the defendant had entered the service of the plaintiff, who was a druggist carrying on his business in the town of Taunton, as the plaintiff's assistant, under a contract whereby he agreed that he would not, at any time after leaving the plaintiff's service, engage in the business of a druggist and chemist in that town. The agreement was held void in the lower court on the ground that the restraint was larger than the necessary protection of the party in favor of whom it was given required.[28] This judgment was reversed on writ of error on the ground that a restriction so extensive in point of time was necessary for the protection of the promisee in the enjoyment of the good will of his trade. "The good will of a trade," it was said by Tindal, C. J., "is the subject of value and price. It may be sold, bequeathed, or become assets in the hand of the personal representative of a trader; and, if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable (as undoubtedly it is not) to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative." [29]

Am. Rep. 64. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[27] Hitchcock v. Coker, 6 Adol. & E. 453; Smith v. Brown, 164 Mass. 584, 42 N. E. 101; Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37; Carrl v. Snyder (N. J. Ch.) 26 Atl. 977; French v. Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Up River Ice Co. v. Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Eisel v. Hayes, 141 Ind. 41, 40 N. E. 119; O'Neal v. Hines, 145 Ind. 32, 43 N. E. 946; Swanson v. Kirby, 98 Ga. 586, 26 S. E. 71; Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[28] Hitchcock v. Coker, 6 Adol. & E. 438. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[29] Hitchcock v. Coker, 6 Adol. & E. 453. And see Pemberton v. Vaughan, 10 Q. B. 87; Elves v. Crafts, 10 C. B. 241; Atkyns v. Kinnier, 4 Exch.

Some courts draw a distinction between contracts binding the promisor to desist from the practice of a learned profession, and contracts not to engage in a business which, with its good will, the promisor has sold, holding that in the former case a restraint unlimited in time is unreasonable.[80] Thus, in a recent New Jersey case, in which it was held that since a contract imposing a restraint greater than is necessary to protect the party for whose benefit it is imposed is void, a covenant that a physician shall not "at any time thereafter" engage in practice in a certain city is void, because it would prevent him from practicing after the death of the other party.[81] The court considered the English case above mentioned, and held that the reasoning did not apply. "The practice of a physician," it was said, "is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value." The contrary, however, has been held in Rhode Island. The reason of the English decisions mentioned above, it was said, "is as valid in the case of a profession as of a trade; for whether, technically speaking, there be any good will attending a profession or not, the professional practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice and sell it, he could probably sell it for more if he would secure the purchaser from competition forever than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could for the same reason make better terms with him." [82]

(Welsb., H. & G.) 782; Bowser v. Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[80] Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37; Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154. *See "Contracts," Dec. Dig (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[81] Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[82] French v. Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733. To the same effect, see Butler v. Burleson, 16 Vt. 176; Martin v. Murphy, 129 Ind. 464, 28 N. E. 1118; Linn v. Sigsbee, 67 Ill. 75; McClurg's Appeal, 58 Pa. 51; Miller v. Elliott, 1 Ind. 484, 50 Am. Dec. 475; Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64; Doty v. Martin, 32 Mich. 462; Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; Cole v. Edwards, 93 Iowa, 477, 61 N. W. 940; McCurry v. Gibson, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177; Tillinghast v. Boothby, 20 R. I. 59, 37 Atl. 344; Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Agreement never to practice law in a particular town.

Sale of Secret Process

A person engaged in manufacturing an article by a secret process may sell the business and secret, and make a valid promise not to divulge the secret to any one else, nor to engage himself at any time in manufacturing by that process. Such a restraint is necessary to protect the other party, and does not unduly prejudice the public. In speaking of such a contract, it was said by the New York court, in a late case, that it "simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what he paid for. It imposed no restriction upon either that was not beneficial to the other by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory." [83]

Agreement to Assign Future Patents

A general assignment, or agreement to assign, all inventions thereafter made by a party, is not only contrary to public policy, but is void under the patent laws of the United States.[84] But a contract to assign future inventions is valid, where it relates to a particular subject and imposes only such restraint upon the assignor as is fairly and reasonably necessary for the protection of the assignee under all the circumstances of the case.[85] An

Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; Bunn v. Guy, 4 East, 190. Agreement not to practice dentistry in a particular town. Turner v. Abbott, 116 Tenn. 718, 94 S. W. 64, 6 L. R. A. (N. S.) 892, 8 Ann. Cas. 150. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[83] TODE v. GROSS, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475, Throckmorton Cas. Contracts, 270 (affirming 51 Hun, 644, 4 N. Y. Supp. 402). And see Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; Wiley v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Vickery v. Welch, 19 Pick. (Mass.) 523; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Jarvis v. Peck, 10 Paige (N. Y.) 118. Condition of contract of employment that servant shall not use or divulge trade secrets is not invalid as in restraint of trade. Thum Co. v. Tloczynski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; Simmons Medicine Co. v. Simmons (C. C.) 81 Fed. 163; McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249. *See "Contracts," Dec. Dig. (Key-No.) § 117; Cent. Dig. §§ 554–569.*

[84] Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387). See Consolidated Ry., etc., Co. v. United States Light & Heating Co., 77 N. J. Eq. 285, 78 Atl. 684. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. § 552.*

[85] Consolidated Ry., etc., Co. v. United States Light & Heating Co., supra;

illustration of such a reasonable and valid contract is a contract for the sale of letters patent for a machine, "together with all improvements I may hereafter make." [86]

SAME—UNLAWFUL COMBINATIONS—MONOPOLIES, TRUSTS, ETC.

170. A combination between dealers in a necessary commodity to control and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or other illegitimate means, is contrary to public policy.

171. Combinations to prevent competition have been allowed under particular circumstances.

172. A combination between laborers, mechanics, and other workmen to control the price of their labor, by the weight of authority, is lawful if unlawful or unreasonable means for accomplishing the object are not contemplated, the mere fact of combination to control the price of labor not being per se illegal.

A monopoly, as now understood, is a combination the tendency of which is to prevent competition and to control prices to the detriment of the public.[87] So a trust, as the term is commonly employed, is a combination for the purpose of establishing a monopoly.[88] To render a contract void on the ground that its object

Reece Folding Machine Co. v. Fenwick, 140 Fed. 287, 72 C. C. A. 89, 2 L. R. A. (N. S.) 1094 and note; Westinghouse Air Brake Co. v. Chicago Brake & Mfg. Co. (C. C.) 85 Fed. 786. And see Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462. Contract of employment between company using patented machines and mechanic, which requires that improvements in machines made by mechanic shall belong to company, is not unreasonable. Hulse v. Machine Co., 65 Fed. 864, 13 C. C. A. 180. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. § 552.*

[86] Aspinwall Mfg. Co. v. Gill (C. C.) 32 Fed. 697. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. § 552.*

[87] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667. And see STANDARD OIL CO. OF NEW JERSEY v. UNITED STATES, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, Throckmorton Cas. Contracts, 274. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[88] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

is to establish a monopoly or trust, it is not necessary to prove any evil intent of the parties or actual injury to the public. It is sufficient to show that the necessary tendency of the contract is to control prices, limit production, or suppress competition in such a way as to create a monopoly to the injury of the public.[39] So it is not necessary to show that the contract relates to one of the prime necessaries of life. It is sufficient that it relates to a legitimate article of trade or commerce in extensive use.[40]

The law does not undertake to say to a dealer in a commodity, even though it may be one of the necessaries of life, that he shall not sell it above a certain price, nor to compel him to sell it at all. Singly, he may suspend sales and raise the price to suit his own interests, though it may be detrimental to the public interest. The law does, however, condemn a combination between several manufacturers or dealers in a necessary commodity, the object of which is to control and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or other illegitimate means. "When competition is left free," it was said by the Pennsylvania court, in holding a combination between coal companies void, "individual error or folly will generally find a correction in the conduct of others. But here the companies have combined together to govern the supply and the price of coal. * * * This combination has a power in its confederated forms which no individual can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise; or, if the supply goes forward, the price fixed by the confederates must accompany it. * * * The influence of a lack of supply, or a rise in the price, of an article of such prime necessity, cannot be measured. * * * Such a combination is more than a contract; it is an offense."[41]

[39] Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667; Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co., 58 W. Va. 22, 50 S. E. 876, 112 Am. St. Rep. 936, 6 Ann. Cas. 154. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[40] United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[41] Morris Run Coal Co. v. Coal Co., 68 Pa. 173, 8 Am. Rep. 159. See, also, Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Arnot v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; People v.

Such agreements as these tend to create monopolies and stifle competition. They are not only void at common law, but in most jurisdictions have been expressly declared void by statute, and to the extent that they affect interstate or foreign commerce they are declared void by the act of congress commonly called the Sherman, or anti-trust, act.[42]

Some combinations between dealers are legitimate, and have been sustained, though the object was, to a certain extent, to prevent competition and enhance prices.[43] The line between combinations that are lawful and those that are unlawful is not clear, and the cases are not uniform. It has been held that an agreement between partners not to sell below a certain price is not

Refining Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; Urmston v. Whitelegg, 63 Law T. 455; De Witt Wire-Cloth Co. v. Wire-Cloth Co., 16 Daly, 529, 14 N. Y. Supp. 277; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; Strait v. Harrow Co. (Sup.) 18 N. Y. Supp. 224; Nester v. Brewing Co., 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894; State v. Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. Rep. 667; People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; Milwaukee Masons' & Builders' Ass'n v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612. *See "Contracts," Dec. Dig. (Key-No) § 116; Cent. Dig. §§ 542–552.*

[42] Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), by which every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is declared illegal; and every person who monopolizes, or attempts or combines or conspires with another to monopolize, any part of such trade or commerce is made guilty of a misdemeanor. This act, as construed by the United States supreme court in the celebrated case of STANDARD OIL CO. OF NEW JERSEY v. UNITED STATES, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, Throckmorton Cas. Contracts, 274, has been held to render illegal and void only contracts in "unreasonable" restraint of trade. See, also, United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. E. C. Kight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552; "Monopolies," Dec. Dig. (Key-No.) §§ 12–20; Cent. Dig. §§ 10–14.*

[43] See Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

unlawful where there is no intention to create a monopoly and control prices.[44]

The rule that combinations to prevent competition and enhance prices are illegal has been held, in the absence of statute, not to apply to a combination between manufacturers of an article which is not a necessity, where the agreement puts no restraint on the production and sale of the article. In a Massachusetts case several rival manufacturers and sellers of a certain fixture, under patents owned by them, who were the principal dealers in the article, and substantially supplied the market with it, entered into a combination to prevent competition between them, and it was upheld. "In effect," it was said, "it is an agreement, between three makers of a commodity, that for three years they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside (the parties have a monopoly by their patents), but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts and to put a price on the products of their own industry. But we cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and customers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid, as in restraint of trade or against public policy." [45]

[44] Marsh v. Russell, 66 N. Y. 288. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[45] Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629. And see Dolph v. Machinery Co. (C. C.) 28 Fed. 553; Skrainka v. Scharringhausen, 8 Mo. App. 522; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612. A contract by which three of four companies engaged in the manufacture of oleomargine consolidate as a corporation, for the purpose of stopping the sharp competition between them, and

On the other hand, however, if it clearly appears that the object of the contract is not the reasonable protection of a business or profession, but rather to create a monopoly and control the price of an article of common utility or common consumption, the contract is illegal, even though the article is not one of the prime necessaries of life.[46]

"Corners" in the Market

There are few combinations more clearly contrary to public policy than agreements to create what are known as "corners" in the market, as where several persons enter into a combination to buy up more of a commodity than there is in the market, so as to force a fictitious and unnatural rise in values, with a view of taking advantage of dealers and purchasers whose necessities compel them to buy.[47] A combination to create a corner in one of the necessaries of life is not only illegal, but is criminal. A combination to acquire a controlling interest in the stock of a corporation for the purpose of creating a corner in the stock market, though probably not criminal, is at least illegal.[48]

Monopolies under Patents

The rule against contracts in restraint of trade and monopolies does not apply to contracts in reference to the production and sale of a patented article. It is the purpose of a patent to give the inventor a monopoly. It is a monopoly authorized by the govern-

agree that none shall separately engage in the business for five years, held not invalid as creating a monopoly. Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784. There can be no monopoly in anything but property, and news is not a subject of property until published and copyrighted, and hence a corporation engaged in gathering and transmitting news for publication cannot be compelled to furnish to a newspaper the same service extended to others. State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. Contra, Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[46] Emery v. Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819 (candles); Cummings v. Stone Co., 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655 (Hudson river bluestone); Cohen v. Envelope Co., 166 N. Y. 292, 59 N. E. 906 (envelopes); Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125 (ice); Arctic Ice Co. v. Franklin Electric & Ice Co., 145 Ky. 32, 139 S. W. 1080. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[47] Wright v. Crabbs, 78 Ind. 487; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499. *See "Gaming," Dec. Dig. (Key-No.) § 11; "Monopolies," Dec. Dig. (Key-No.) §§ 8–31.*

[48] Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–550.*

ment. In upholding an agreement by a patentee to allow an association and its members the exclusive use and sale of inventions patented by him, it was said: "The owner does not possess his patent upon the condition that he shall make or vend the article patented, or allow others to do so for a fair and reasonable compensation. * * * Considerations which might obtain if the agreement were in regard to other articles cannot be of any weight in the decision of the questions arising upon an agreement as to patented articles." [49] Patents, however, confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade, and such a combination is unlawful.[50]

Contracts for the sale of proprietary medicines manufactured under a secret formula have been held by the United States supreme court not to be subject to the rules governing the manufacture and sale of patented articles, and contracts for the sale of such proprietary medicines, which fix the price of resale and impose other restrictions upon the purchaser, have accordingly been declared void.[51]

Combinations between Laborers, Mechanics, and Other Workmen

If dealers cannot combine to stifle competition and control the price of a commodity, it may seem reasonable to suppose that workmen cannot combine to control the price of their labor. Authority for declaring that the same principle applies is not wanting. In an Illinois case, a large number of the law stenographers of Chicago formed an association, and fixed a schedule of prices which should be binding on them. The court held that it was contrary to pub-

[49] Good v. Daland, 121 N. Y. 1, 24 N. E. 15. And see Morse Twist Drill. & Mach. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Bowling v. Taylor (C. C.) 40 Fed. 404; Gloucester Isinglass & Glue Co. v. Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214; Printing & Numerical Reg. Co. v. Sampson, L. R. 19 Eq. 462; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; ante, p. 396. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. § 552.*

[50] A combination among manufacturers of harrows, by which each assigns to a corporation patents under which he is operating, and takes back an exclusive license to make and sell the same style of harrow previously made by him, and no other, all to sell at uniform prices, held to be unlawful. National Harrow Co. v. Hench (C. C.) 76 Fed. 667; Id., 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299. See, also, National Harrow Co. v. Quick (C. C.) 67 Fed. 130; Strait v. Harrow Co. (Sup.) 18 N. Y. Supp. 224. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. § 552.*

[51] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 [affirming 164 Fed. 803, 90 C. C. A. 579]. And see to the same effect, W. H. Hill Co. v. Gray & Worcester, 163 Mich. 12, 127 N. W 803, 30 L. R. A. (N. S.) 327. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

lic policy and illegal, citing, in support of the judgment, cases in which dealers in commodities and proprietors of boats had combined for a similar purpose. "All of the members of the association," it was said, "are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection." [52]

By most courts, however, it is held that combinations between laborers, mechanics, or other workmen are valid, even though the object be to prevent competition and maintain prices, provided the provisions for that purpose are reasonable.[53] Greenhood [54] lays down the rule (no doubt established by the weight of authority) that "combinations of artisans for their common benefit, as for the development of skill in their trade, or to prevent overcrowding therein,[55] or to encourage those belonging to their trade to enter their fold,[56] or for the purpose of raising the prices of labor,[57] are valid, provided no force or other unlawful means be employed to

[52] More v. Bennett, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[53] Collins v. Locke, 4 App. Cas. 674. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[54] Greenh. Pub. Pol. rule 546.

[55] Snow v. Wheeler, 113 Mass. 179. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552; "Trade Unions," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–6.*

[56] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. In this case a rule of an association forbade its members to work for any one who should employ nonunion members, and yet the combination was held not illegal. This, however, was a criminal prosecution, and this fact may be important. Many acts and objects render a contract illegal as being contrary to public policy which would not render the parties liable to a criminal prosecution. See Greenh. Pub. Pol. 648, note 2. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[57] Collins v. Locke, 4 App. Cas. 674; Master Stevedores' Ass'n v. Walsh, 2 Daly (N. Y.) 1; Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. But see People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

carry out their ends,[58] or their object be not to impoverish third persons,[59] or to extort money from employers,[60] or to encourage strikes or breaches of contract,[61] or to restrict the freedom of members for the purpose of compelling employers to conform to their rules."[62] So an agreement between professional men, by which a schedule of fees is established, is not illegal.[63]

Combinations between Employers

In England a contract between employers for the purpose of protecting their interests against combinations of workmen, by which they agree to regulate wages and hours of work, or wholly or partially to suspend work for a time, as the majority may resolve, has been held in restraint of trade, as depriving each of the control of

[58] Reg. v. Rowlands, 17 Adol. & E. 671; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Old Dominion S. S. Co. v. McKenna (C. C.) 30 Fed. 48. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[59] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; Rigby v. Connol, 14 Ch. Div. 482; Hornby v. Close, L. R. 2 Q. B. 153. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[60] Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[61] Hornby v. Close, L. R. 2 Q. B. 153; Farrer v. Close, L. R. 4 Q. B. 602; Old Dominion S. S. Co. v. McKenna (C. C.) 30 Fed. 48. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[62] A provision in a contract between stevedores that unless the merchants in particular cases employ one of the contracting parties to whom, as between themselves, the business is assigned by the contract, none of them will accept the employment, is bad. Collins v. Locke, 4 App. Cas. 674. A contract between a brewers' association and a labor union, providing that no employé of the former shall work more than four weeks without becoming a member of the latter, is void. Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. A liverymen's association, which prohibits any member from doing business with any person who does not patronize its members exclusively, or from letting a hearse to a person for a funeral where the undertaker patronizes nonunion members, is illegal. Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1. By-laws of a builders' association, which require members to pay to the association 6 per cent. on all contracts taken by them, and to submit all bids first to the association, and provide that the lowest bidder shall add 6 per cent. to his bid before it is submitted to the owner, are void. Milwaukee Masons' & Builders' Ass'n v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97. To same effect, Bailey v. Association, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[63] Rohlf v. Kasemeier, 140 Iowa, 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1284, 132 Am. St. Rep. 261, 17 Ann. Cas. 750. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

his own business, and therefore not enforceable.[64] In Pennsylvania, on the other hand, it has been held that where employés enter into a combination, which under the statutes of the state is lawful, to control by artificial means the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is lawful, since it is not made to lower the price of labor as regulated by supply and demand.[65] So a contract between employers by which they agree not to employ any person who belongs to a certain labor organization or to any organization affiliating therewith has been declared valid,[66] And a contract between an employer and a labor union, by which the employer agrees to employ for a certain period only members of the union, is not contrary to public policy.[67]

SAME—EXEMPTION FROM LIABILITY FOR NEGLIGENCE

173. As a general rule, a party may make a valid contract for exemption from liability for his own negligence or that of his servants.

174. EXCEPTIONS:

(a) A stipulation, in a contract between master and servant, that the master shall not be liable for injuries to the servant caused by the negligence of the master, or by the negligence of superior servants for which the law makes the master liable, is contrary to public policy.

(b) The same is true of a stipulation in a contract with a common carrier, either of goods or passengers, exempting it

[64] Hilton v. Eckersley, 6 El. & Bl. 47, 66. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[65] Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686. "The moment the legislature relieves one," said the court, "and by far the larger number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, down went the foundation on which common-law conspiracy was based as to that particular subject." *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[66] Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220 (C. C.) 159 Fed. 500. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

[67] Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280 [reversing 99 App. Div. 481, 90 N. Y. Supp 854]; Kissam v. United States Printing Co. of Ohio, 199 N. Y. 76, 92 N. E. 214 [affirming judgments 128 App. Div. 889, 112 N. Y. Supp. 1134, 1137]. *See "Contracts," Dec. Dig. (Key-No.) § 116; Cent. Dig. §§ 542–552.*

from liability for losses or injuries caused by its negligence.

(c) The same is true, in some jurisdictions, of a stipulation by a telegraph company exempting it from liability for error, delay, or nondelivery; but as to this there is a direct conflict of opinion.

In accordance with the general policy of the law, which favors the freedom of contract, a person may, except in certain cases, make a valid contract for exemption from liability for the negligence of himself or that of his servants.[68] Illustrations of such contracts are fire insurance policies, which protect the insured against losses by fire occasioned by his negligence, policies of liability insurance, which protect the insured against liability for personal injuries caused by the negligence of himself or his servants, and contracts by a railroad company with persons allowed by it to build on its right of way for exemption from liability for injury to such structures by fire due to the negligent operation of the company's locomotives.[69]

A party may not, however, by contract exempt himself from liability for his negligence in the performance of certain absolute duties imposed by law. Thus a master owes certain duties to his servants, and a common carrier to passengers and shippers of goods, which duties are imposed by law in the interest of the public, and against liability for the breach of which he may not contract.[70]

According to the better opinion, a master cannot, by stipulation in the contract with his servant, exempt himself from liability for injuries to the servant caused by his negligence. Such a stipulation is void as being contrary to public policy.[71] It has also been held

[68] JAMES QUIRK MILLING CO. v. MINNEAPOLIS & ST. L. R. CO., 98 Minn. 22, 107 N. W. 742, 116 Am. St. Rep. 336, Throckmorton Cas. Contracts, 286. *See "Railroads," Dec. Dig. (Key-No.) § 469; Cent. Dig. § 1665.*

[69] JAMES QUIRK MILLING CO. v. MINNEAPOLIS & ST. L. R. CO., supra. *See "Railroads," Dec. Dig. (Key-No.) § 469; Cent. Dig. § 1665.*

[70] JAMES QUIRK MILLING CO. v. MINNEAPOLIS & ST. L. R. CO., supra. *See "Carriers," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 637–648; "Master and Servant," Dec. Dig. (Key-No.) § 100; Cent. Dig. §§ 166–170.*

[71] Runt v. Herring, 2 Misc. Rep. 105, 21 N. Y. Supp. 244, and cases there cited; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360; RICHMOND & D. R. CO. v. JONES, 92 Ala. 218, 9 South. 276, Throckmorton Cas. Contracts, 337; Roesner v. Hermann (C. C.) 8 Fed. 782. See Purdy v. Railroad Co., 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736. Where an employé joins a relief association to which he contributes, and his employer guaranties the obligations, etc., the employé's agreement in his application for membership that acceptance of benefits from the association for an injury shall release the company from damages is not void as against public policy, since he has the right of election to accept benefits or sue. Otis v. Pennsylvania Co. (C. C.)

that, since the liability imposed upon a railroad company by law for injuries to their servants caused by the carelessness of those who are superior in authority and control over them is based upon considerations of public policy, for this reason a railroad company cannot stipulate with its employés, at the time and as a part of their contract of employment, that such liability shall not attach to it. "Such liability is not created for the protection of the employé simply, but has its reason and foundation in a public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements." [72]

A railroad company, shipowner, or other common carrier cannot, by stipulation in contracts of carriage, exempt itself from liability, or limit its liability, for injury to passengers or goods caused by its own negligence or the negligence of its servants. Such a stipulation is, in this country at least, regarded as contrary to public policy.[73] It may, however, exempt itself from losses or injuries occurring from other causes than its own negligence, as from accident, and for which it would be liable as an insurer.[74]

71 Fed. 136; Maine v. Railroad Co., 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; Pittsburg, C., C. & St. L. Ry. Co. v. Cox, 55 Ohio, 497, 45 N. E. 641, 35 L. R. A. 507; Eckman v. Railroad Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; Pittsburg, C., C. & St. L. Ry. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Hamilton v. Railroad Co. (C. C.) 118 Fed. 92; Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 South. 761 (collecting and discussing cases). *See "Master and Servant," Dec. Dig. (Key-No.) § 100; Cent. Dig. §§ 166–170.*

[72] Lake Shore & M. S. Ry. Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833; Johnson's Adm'x v. Railroad Co., 86 Va. 975, 11 S. E. 829; Hissong v. Railroad Co., 91 Ala. 514, 8 South. 776; JAMES QUIRK MILLING CO. v. MINNEAPOLIS & ST. L. R. CO., 98 Minn. 22, 107 N. W. 742, 116 Am. St. Rep. 336, Throckmorton Cas. Contracts, 286. Contra, Western & A. R. Co. v. Bishop, 50 Ga. 465 (holding such a contract valid so far as it does not waive any criminal neglect of the company or its principal officers; but this case expressly declares that contracts contravening public policy will not be enforced). *See "Master and Servant," Dec. Dig. (Key-No.) § 100; Cent. Dig. §§ 166–170.*

[73] New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Armstrong v. Express Co., 159 Pa. 640, 28 Atl. 448; Abrams v. Railway Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; Schulze-Berge v. The Guildhall (D. C.) 58 Fed. 796; Monroe v. The Iowa (D. C.) 50 Fed. 561; Johnson v. Railway Co., 69 Miss. 191, 11 South. 104, 30 Am. St. Rep. 534; Louisville & N. R. Co. v. Grant, 99 Ala. 325, 13 South. 599; Gulf, C. & S. F. R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Louisville & N. R. Co. v. Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871; Union Pac. Ry. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; The Hugo (D. C.) 57 Fed. 403; Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968; St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335. *See "Carriers," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 637, 642.*

[74] Indianapolis, D. & W. R. Co. v. Forsythe, 4 Ind. App. 328, 29 N. E. 1138;

As to the validity of stipulations in contracts with telegraph companies for the transmission of messages, there is a direct conflict. Many cases hold that a stipulation providing that the liability of the company for any mistake or delay in the transmission and delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and not against public policy, except in so far as it would exempt the company from liability for willful misconduct or gross negligence.[75] Another class of cases holds that there can be no consideration for such a stipulation on the part of the sender of the message, and, furthermore, that it is contrary to public policy.[76] Still another class of cases, while

Davis v. Railroad Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Hartford Fire Ins. Co. v. Railroad Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84. It may limit its liability to injuries received on its own line, Texas & P. Ry. Co. v. Smith (Tex. Civ. App.) 24 S. W. 565; Galveston, H. & S. A. R. Co. v. Short (Tex. Civ. App.) 25 S. W. 142; McCann v. Eddy (Mo.) 27 S. W. 541; McEacheran v. Railroad Co., 101 Mich. 264, 59 N. W. 612; Coles v. Railroad Co., 41 Ill. App. 607; Dunbar v. Railway Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; but not when it is a partner with the connecting line, Gulf, C. & S. F. R. Co. v. Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302. It may exempt itself from liability after unloading, where it provides a covered warehouse into which the cargo is discharged, and the time and place of discharge are easily ascertainable by the consignees. Constable v. Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903. Express messenger, accompanying express car in pursuance of contract between railroad company and express company, held not a passenger, and cannot recover from railroad company for injuries in collision where contract between companies exempts from such liability and his own contract of employment assumes such risk. Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560. *See "Carriers," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 637, 642.*

[75] Riley v. Telegraph Co., 6 Misc. Rep. 221, 26 N. Y. Supp. 532; Primrose v. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; Grinnell v. Telegraph Co., 113 Mass. 299, 18 Am. Rep. 485; Western Union Telegraph Co. v. Carew, 15 Mich. 525; Camp v. Telegraph Co., 1 Metc. (Ky.) 164, 71 Am. Dec. 461; Breese v. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; Passmore v. Telegraph Co., 78 Pa. 238; Western Union Telegraph Co. v. Blanchard, 68 Ga. 299 (45 Am. Rep. 486, note, collecting cases); Colt v. Telegraph Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153. *See "Telegraphs and Telephones," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 39–47.*

[76] Brown v. Telegraph Co., 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793; Tyler v. Telegraph Co., 60 Ill. 421, 14 Am. Rep. 38; Western Union Telegraph Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Wertz v. Telegraph Co., 8 Utah, 499, 33 Pac. 136; Western Union Telegraph Co. v. Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; Western Union Telegraph Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680; Candee v. Telegraph Co., 34 Wis.

upholding such a stipulation in part, hold that it cannot exonerate the company from liability for damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators.[77]

EFFECT OF ILLEGALITY

We come now to the second branch of the subject of illegality in contract—its effect upon the validity of a contract. The effect of illegality upon the validity of contracts in which it appears varies according to the circumstances. It may affect the whole, or only a part, of a contract, and the legal and illegal parts may or may not be capable of separation. The direct object of a contract may be the doing of an illegal act, or the direct object may be innocent, though the contract is designed to further an illegal purpose. The parties may both be ignorant, or both be aware, of the illegality which remotely or directly affects the transaction; or one may be innocent of the objects intended by the other. Securities may be given for money due upon, or money advanced for, an illegal transaction, and the validity of such securities depends upon various considerations. Finally, though the contract is illegal, certain considerations may require that some relief be granted to one of the parties, notwithstanding his fault. This is a very complex and difficult branch of the law, and on some of the questions suggested there is a conflict of opinion. All we can do is to state the general principles which govern, and call attention to those points on which there is a conflict.[78]

SAME—AGREEMENTS PARTLY ILLEGAL

175. Where an agreement is illegal in part only, the part which is good may be enforced, provided it can be separated from the part which is bad, but not otherwise. In detail:

(a) An indivisible promise to do several acts, some of which are illegal, or a single promise to do a legal act, based on several considerations, one of which is illegal, is wholly void.

477, 17 Am. Rep. 452; Bartlett v. Same, 62 Me. 218, 16 Am. Rep. 437; Western Union Telegraph Co. v. Chamblee, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89. *See "Telegraphs and Telephones," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 39–47.*

[77] Sweatland v. Telegraph Co., 27 Iowa, 433, 1 Am. Rep. 285. *See "Telegraphs and Telephones," Dec. Dig. (Key-No.) § 54; Cent. Dig. §§ 39–47.*

[78] Anson, Cont. (4th Ed.) 189.

(b) But where distinct promises, some of which are good, are based on a good consideration, or where there are distinct promises based on several distinct considerations, some of which are good, the good promises, or promises based on good considerations, may be enforced.

An agreement may consist of a single promise based on a single consideration. If either the promise or the consideration is illegal, there is no difficulty in pronouncing the agreement void.[79] On the other hand, there may be several promises or considerations, some of which only are illegal, and in these cases the agreement may or may not be wholly void, according to the circumstances. Whether it is wholly void or not will depend upon whether it is one entire and indivisible agreement, or whether it is divisible, so that the good may be separated from the bad. "If any part of an agreement is valid, it will avail pro tanto, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant." [80] "If the part which is good depends upon that which is bad, the whole is void; and so I take the rule to be if any part of the consideration be malum in se, or the good and void consideration be so mixed, or the contract so entire, that there can be no apportionment." [81]

At one time a distinction was made in the application of this principle between illegality by reason of a statute and illegality at common law. The judges, fearing that statutes might be eluded, laid it down that "the statute is like a tyrant—where he comes he makes all void; but the common law is like a nursing father—makes only void that part where the fault is, and preserves the rest." Such a distinction, however, is no longer recognized.[82]

[79] Dennehy v. McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609. *See "Contracts," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 681–700.*

[80] Rand v. Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131 [overruling Loomis v. Newhall, 15 Pick. (Mass.) 159]; Bixby v. Moor, 51 N. H. 402. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[81] 2 Kent, Comm. 467; U. S. v. Bradley, 10 Pet. 343, 9 L. Ed. 448; HANDY v. ST. PAUL GLOBE PUB. CO., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695, Throckmorton Cas. Contracts, 227; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[82] Anson, Cont. (4th Ed.) 189; Pickering v. Railway Co., L. R. 3 C. P. 250; State v. Findley, 10 Ohio, 51; Rand v. Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131; U. S. v. Bradley, 10 Pet. 343, 9 L. Ed. 448; Hynds v. Hays, 25 Ind. 31. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

The above are the general rules, but it will aid us in understanding the doctrine if we state the law more in detail.

Same—Indivisible Agreements

If a promise to do several acts is indivisible, and is in part illegal, if cannot be enforced as to that part which is legal, but the whole agreement is void.[83] This rule is too clear to need explanation. The only difficulty is in determining whether the promise is divisible; but this is a question of interpretation of contracts.

Where the agreement consists of one promise made upon several considerations, some of which are bad and some good, here, also, the promise is wholly void, for it is impossible to say whether the legal or the illegal portion of the consideration most affected the mind of the promisor, and induced his promise.[84] An illustration

[83] Crawford v. Morrell, 8 Johns. (N. Y.) 253; Thayer v. Rock, 13 Wend. (N. Y.) 53; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554; Union Cent. Life Ins. Co. v. Berlin, 90 Fed. 779, 33 C. C. A. 274; Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co. (Ind. App.) 70 N. E. 843, 846 [quot. proposition of text from Clark on Contracts (1st Ed.) 472]. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[84] Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co. (Ind. App.) 70 N. E. 843, 846 [quot. proposition of text from Clark on Contracts (1st ed.) 473]; State v. Wilson, 73 Kan. 334, 80 Pac. 639, 84 Pac. 737, 117 Am. St. Rep. 479 [cit. Clark on Contracts (1st Ed.) 471]; Featherston v. Hutchinson, Cro. Eliz. 199; TRIST v. CHILD, 21 Wall. 441, 22 L. Ed. 623, Throckmorton Cas. Contracts, 241; State v. Board, 35 Ohio St., at page 519; Bixby v. Moor, 51 N. H. 402; Wisner v. Bardwell, 38 Mich. 278; Saratoga County Bank v. King, 44 N. Y. 87; Bredin's Appeal, 92 Pa. 241, 37 Am. Rep. 677; Sumner v. Summers, 54 Mo. 340; Perkins v. Cummings, 2 Gray (Mass.) 258; BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, Throckmorton Cas. Contracts, 290; McQuade v. Rosecrans, 36 Ohio St. 442; Tobey v. Robinson, 99 Ill. 222; James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; Pettit's Adm'r v. Pettit's Distributees, 32 Ala. 288; Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Chandler v. Johnson, 39 Ga. 85; Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; Edwards Co. v. Jennings, 89 Tex. 618, 35 S. W. 1053; Geer v. Frank, 179 Ill. 570, 53 N. E. 963, 45 L. R. A. 110. But see Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480; Fishell v. Gray, 60 N. J. Law, 5, 37 Atl. 606; Rosenbaum v. Credit System Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; King v. King, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635. Thus, in Kansas, it is held that a chattel mortgage is entirely void if illegal as to one of the articles mortgaged (intoxicating liquors). Gerlach v. Skinner, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240; Flersheim v. Cary, 39 Kan. 178, 17 Pac. 825. No recovery, for instance, can be had on the quantum meruit for services rendered in the grocery part of the business under a contract to work for agreed wages as bartender and clerk for a dealer in groceries and liquors, the sale of the latter being prohibited. Sullivan v.

of this rule is in the case of sales of goods, some of which it is illegal to sell. Where each article is sold for a separate price, the price of those articles which it was lawful to sell may be recovered.[85] If, however, a note is given for the price of all the articles, there can be no recovery at all on it, for it is based in part on an illegal consideration.[86]

The consideration, to bring a case within this principle, must be illegal and not merely void. If part of the consideration is merely void, and there is still a valid consideration left, it will support the promise, for, as we have seen, the law does not undertake to determine whether the consideration is adequate. It is only where part of the consideration is illegal that it taints the entire agreement.[87]

Same—Divisible Agreements

Where an agreement consists of several promises based upon several considerations, the fact that one or more of the considerations is illegal will not avoid all the promises, if those which are based upon legal considerations are severable from the others.[88] Thus, in the case of the sale of various articles, some of which it is illegal to sell, if each article is sold for a separate price, so that the consideration is apportionable, the price of those which it was lawful to sell may be recovered.[89]

Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110. A note, in consideration of both past and future cohabitation, is void in toto. Massey v. Wallace, 32 S. C. 149, 10 S. E. 937. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[85] See cases cited infra, note 89.

[86] Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664; Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Kidder v. Blake, 45 N. H. 530; Allen v. Pearce, 84 Ga. 606, 10 S. E. 1015; Braitch v. Guelick, 37 Iowa, 212; Cotten v. McKenzie, 57 Miss. 418; Oakes v. Merrifield, 93 Me. 297, 45 Atl. 31. But see Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837; Wilcox v. Daniels, 15 R. I. 261, 3 Atl. 204. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[87] Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664; ante, p. 140. See, also, Rosenbaum v. Credit System Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; King v. King, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[88] Robinson v. Green, 3 Metc. (Mass.) 159. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[89] Carleton v. Woods, 28 N. H. 290; Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837; Walker v. Lovell, 28 N. H. 138, 61 Am. Dec. 605; Boyd v. Eaton, 44 Me. 51, 69 Am. Dec. 83; Chase's Ex'rs v. Burkholder, 18 Pa. 48. If a sale of a number of articles is for a gross price, the contract is indivisible, and, if a sale of some is prohibited, none of the price can be recovered. Ladd v. Dillingham, 34 Me. 316. And see Holt v. O'Brien, 15 Gray

Again, if there are several promises, made for a lawful consideration, some of which are legal and some illegal, the legal promises may be enforced.[90] At an early day it was declared "that if some of the covenants of an indenture or the conditions indorsed upon a bond are against law, and some are good and lawful; that in this case the covenants or conditions which are against law are void ab initio, and the others stand good."[91] In other words, a lawful promise, made upon a lawful consideration, is not invalid merely because an unlawful promise was made at the same time and for the same consideration.[92] This principle is frequently applied to contracts in restraint of trade.[93] An agreement, for instance, not to engage in business at a certain place, or any other place, though void as to the general restriction, may be enforced as to the partial restriction, provided the restriction is so worded as to be divisible.[94]

(Mass.) 311. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[90] Bank of Australia v. Breillat, 6 Moore, P. C. 152, 201; U. S. v. Bradley, 10 Pet. 343, 9 L. Ed. 448; State v. Board, 35 Ohio St. 519; State v. Findley, 10 Ohio, 51; Union Locomotive & Express Co. v. Railway Co., 35 N. J. Law, 240; Stewart v. Railway Co., 38 N. J. Law, at page 520; Presbury v. Fisher, 18 Mo. 50; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520; Pennsylvania Co. v. Wentz, 37 Ohio St. 333; Ware v. Curry, 67 Ala. 274; U. S. v. Hodgson, 10 Wall. 395, 19 L. Ed. 937; U. S. v. Mora, 97 U. S. 413, 24 L. Ed. 1013; Piper v. Boston & M. R. R., 75 N. H. 435, 75 Atl. 1041; Osgood v. Central Vermont R. Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803. Contra, Lindsay v. Smith, 78 N. C. 328, 24 Am. Rep. 463. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[91] Pigot's Case, 11 Co. Rep. 27b. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[92] Pollock, Cont. (3d Ed.) 337. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[93] BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, Throckmorton Cas. Contracts, 290. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[94] Peltz v. Eichele, 62 Mo. 171; Dean v. Emerson, 102 Mass. 480; Mallon v. May, 11 Mees. & W. 653; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Thomas v. Miles' Adm'r, 3 Ohio St. 275; Davies v. Lowen, 64 Law T. 655; Haynes v. Dorman, [1899] 2 Ch. 13; Smith's Appeal, 113 Pa. 579, 6 Atl. 251; Rosenbaum v. Credit System Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; Security Life & Annuity Co. v. Costner, 149 N. C. 293, 63 S. E. 304. Contra, More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621. A contract by which one formerly dealing in oil in the city of H. agreed not to prosecute such business within the state, the city of I. excepted, for five years, is not divisible, and, being void as to the restriction within the state, is void as to the restriction in the city of H. Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193. In New Jersey, a contract by which a party agreed not to engage in business within 500 miles of Jersey

Illustrations of this rule are also found in cases where a corporation has entered into an agreement, some parts of which are ultra vires, and so, in a sense, unlawful. It is held in such cases that, "where you cannot sever the illegal from the legal part, * * * the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." [95] These cases serve as an illustration, but it must be remembered that agreements of this nature are invalidated not so much by the illegality of their objects as by the incapacity of the corporation to bind itself.[96]

SAME—OBJECT UNLAWFUL BUT INTENTION INNOCENT

176. Where the direct object is illegal, the agreement is void, though the parties did not know of the illegality, since ignorance of law is no excuse.

177. EXCEPTIONS—This rule does not apply

(a) Where the agreement can be, and is, legally performed in a way not originally contemplated, if there was no intention to break the law.

(b) Where a party performs his part in ignorance of a fact which renders performance illegal, and which he is not bound to know.

Where the direct object of the parties is to do an illegal act, the agreement is void. In such a case it is immaterial that they did not know their object was illegal, for ignorance of law is no excuse.[97] A contract, for instance, in violation of a statute, cannot be sustained on the ground that the parties did not know of the existence of the statute.

City has been held divisible and enforceable as to the city, even if unenforceable as to the outside territory. Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[95] Pickering v. Railway, L. R. 3 C. P. 250; State v. Board, 35 Ohio St. 519. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[96] Ashbury Carriage Co. v. Riche, L. R. 7 H. L. 653. See Anson, Cont. (8th Ed.) 207. *See "Contracts," Dec. Dig. (Key-No.) § 137; Cent. Dig. §§ 701–712.*

[97] Favor v. Philbrick, 7 N. H. 326; Rosenbaum v. Credit System Co., 64 N. J. Law, 34, 44 Atl. 966. *See "Contracts," Dec. Dig. (Key-No.) §§ 102, 137; Cent. Dig. §§ 462–467.*

Ignorance of illegality, however, may become important if the contract admits of being performed, and is in fact performed, in a legal manner, though a detail in the performance as originally contemplated by the parties would, unknown to them, have directly resulted in a breach of the law. In a leading case on this point the defendant had chartered the plaintiff's ship to take a cargo of hay from a port in France to London, the cargo to be taken from the ship alongside and landed at a certain wharf. Unknown to the parties an order in council had forbidden the landing of French hay. The defendant on learning this, instead of landing the cargo, took it from alongside the ship in the Thames into another ship, and exported it. In an action by the plaintiff for delay of his vessel the defendant set up the unlawful intention as avoiding the contract, but without success. "We quite agree," it was said by the court, "that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that, in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance." [88]

Mistake of Fact

Though mistake of law does not excuse, it is otherwise in case of mistake of fact.[99] A father, for instance, may recover for services performed by his minor son, in unlawfully selling intoxicating liquors if he did not know the character of the services while his son was performing them. In reference to the defense of illegality in such a case it was said: "This defense is founded on a well-settled rule of law, that the law will not lend its aid to carry into effect any agreement made for the purpose of accomplishing things expressly prohibited by law. * * * The only question is whether it applies to this case. If the plaintiff did not place his son in the service of the defendant for the purpose of selling liquor illegally, more especially if he did not consent to it or know of it, then he is chargeable with no violation of law; and being, by the general rule of law, entitled to compensation for the services of his son, the defense is not maintained." [1]

[88] Waugh v. Morris, L. R. 8 Q. B. 202. See Fox v. Rogers, 171 Mass. 546, 50 N. E. 1041. *See "Contracts," Dec. Dig. (Key-No.) §§ 102, 105; Cent. Dig. §§ 462–467.*

[99] Clark, Cr. Law (2d Ed.) 82.

[1] Emery v. Kempton, 2 Gray (Mass.) 257. If, however, an agent sells liquor, for instance, knowing it is to be retailed in violation of law, his prin-

So, also, it has been held that an actor may maintain an action for his services in an unlicensed theatrical exhibition, unless it appears that he knew that his employer had no license. As said in such a case: "It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license, and were doing unlawful acts." [2]

SAME—OBJECT INNOCENT BUT INTENTION UNLAWFUL

178. Where the direct object of an agreement is innocent in itself, but the intention of both parties is unlawful, the agreement is void.

179. Where the direct object of the agreement is innocent, but the intention of one of the parties is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the fact that the other party knows of such purpose does not render the agreement illegal, unless
(a) He shares in the unlawful intention.
(b) Or does some act in aid or furtherance of the other's unlawful design.
(c) Or where the intention is to commit a crime which is not merely malum prohibitum or of inferior criminality.

180. If the direct object of the agreement is innocent, and there is an unlawful intention on one side only, of which the

cipal is charged with such knowledge. Fishel v. Bennett, 56 Conn. 40, 12 Atl. 102. *See "Intoxicating Liquors," Dec. Dig. (Key-No.) § 329; Cent. Dig. §§ 474–481.*

[2] Roys v. Johnson, 7 Gray (Mass.) 162 (cf. Stewart v. Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407). And see Bloxsome v. Williams, 3 Barn. & C. 232; Miller v. Hirschberg (Or.) 37 Pac. 85. As illustrating this principle may also be mentioned bonds given to indemnify an officer or private person assisting him against liability for seizing goods under attachment, or for arresting a person. If the officer knows the seizure or arrest to be unlawful, the bond is illegal; but it is otherwise if he acts in good faith, and in ignorance of the illegality, as where it is in dispute whether property is subject to levy. Stone v. Hooker, 9 Cow. (N. Y.) 154; Marsh v. Gold, 2 Pick. (Mass.) 285; Ives v. Jones, 25 N. C. 538, 40 Am. Dec. 421; Anderson v. Farns, 7 Blackf. (Ind.) 343; Avery v. Halsey, 14 Pick. (Mass.) 174; Davis v. Tibbats, 7 J. J. Marsh. (Ky.) 264; McCartney v. Shepard, 21 Mo. 573, 64 Am. Dec. 250; Whitney v. Gammon, 103 Iowa, 363, 72 N. W. 551. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

other party is ignorant, the latter is entitled to full benefits under the agreement, or, while the agreement is still executory, he may avoid it.

The English Rule

In England it is held that, where the direct object of a contract is innocent in itself, but one of the parties has in contemplation an unlawful purpose, the contract is void if both parties knew of the illegal purpose at the time the contract was entered into; that, though there is nothing illegal in a loan of money or a sale of goods, still, if it is known by the lender or seller that the other party intends to use the money or the goods for an illegal purpose, neither the money lent, nor the goods supplied, can form the subject of an action; that the whole transaction is void. Thus, where the plaintiff supplied a brougham to a prostitute, it was held not necessary to show that he expected to be paid from the proceeds of her calling; that his knowledge of her calling justified the jury in inferring knowledge of her purpose; and that this knowledge rendered the contract void. "My difficulty was," said Bramwell, B., "whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense it was not for the same purpose. If a man were to ask for dueling pistols, and to say, 'I think I shall fight a duel tomorrow,' might not the seller answer, 'I do not want to know your purpose. I have nothing to do with it, that is your business. Mine is to sell the pistols, and I look only to the profit of the trade.' No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of Cannan v. Bryce [3] and McKinnell v. Robinson [4] concludes the matter." [5]

The Rule in America

There is some conflict in this country on this point, but the cases, on the whole, are consistent with the rule that the mere knowledge on the part of one party to a contract that the other contemplates an illegal purpose will not invalidate the contract. We can best

[2] 3 Barn. & Ald. 179. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

[4] 3 Mees. & W. 435. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

[5] Pearce v. Brooks, L. R. 1 Exch. 213. This case seems to have gone further than the cases which the court followed, which were actions brought for the recovery of money lent for an illegal object, the money being furnished for the express purpose of accomplishing that object. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

arrive at a correct understanding of the rules established by the weight of authority in this country by taking cases of sales of goods and loans of money for illustrations, as it is generally with reference to them that the question arises. We will divide the subject accordingly, as some of the courts seem to have made a distinction between sales of goods and loans of money.

Same—Sale

It is everywhere settled that, if it is a part of the contract under which the goods are sold that they shall be used for an unlawful purpose, then the contract is void, and the price cannot be recovered; and the same is no doubt true where goods are sold for the purpose of enabling the buyer to accomplish an unlawful purpose, for in the latter case there is an unlawful intention on the part of both parties.[6] Some cases hold that the sale is void if made "with a view to" the illegal purpose.[7]

[6] Talmage v. Pell, 7 N. Y. 328; St. Louis Fair Ass'n v. Carmody, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571. It has been held, for instance, that if liquor is sold for the express purpose of enabling the buyer to retail it in violation of law, the sale is illegal. Kohn v. Melcher (C. C.) 43 Fed. 641, 10 L. R. A. 439. It has also been held that if a house is knowingly leased or furniture sold to be used as or in a bawdyhouse, or for any other unlawful purpose, the rent or price cannot be recovered. Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Ashbrook v. Dale, 27 Mo. App. 649; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Riley v. Jordan, 122 Mass. 231; Edelmuth v. McGarren, 4 Daly (N. Y.) 467; Ralston v. Boady, 20 Ga. 449; Sherman v. Wilder, 106 Mass. 537; Reed v. Brewer, 90 Tex. 144, 37 S. W. 418; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63; Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960. Some of the above cases come very close to the English rule. See, also, Mound v. Barker, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Cent. Dig. § 464.*

[7] Webster v. Munger, 8 Gray (Mass.) 584; GRAVES v. JOHNSON, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446, Throckmorton Cas. Contracts, 294; Davis v. Bronson, 6 Iowa, 410. "When a sale of intoxicating liquors in another state has just so much greater approximation to a breach of the Massachusetts law as is implied in the statement that it is made with a view to such a breach it is void. Webster v. Munger, 8 Gray, 584; Orcutt v. Nelson, 1 Gray, 536, 541; Hubbell v. Flint, 13 Gray, 277, 279; Adams v. Coulliard, 102 Mass. 167, 172, 173. * * * If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale. * * * We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. * * * The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. * * * If the sale is made with the desire to help him (the buyer) to his end, although primarily made for money the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller while aware of his intent is indifferent to it, or disapproves of it, it may be doubt-

It is also settled that if, in addition to a sale of goods which the vendor knows are to be used for an illegal purpose, he does some act in aid or furtherance of the unlawful design, his contract is void, and he cannot recover the price. An example of such a case is where a person who sells goods not only knows that his vendee intends to smuggle them into the country, but packs them up or marks them in a manner convenient for the purpose, with a view of their being smuggled.[8]

If the vendor of goods knows that they are to be used for the perpetration of a crime which is not merely malum prohibitum or of inferior criminality, even though he may not expressly stipulate that they shall be so used, and though he does nothing further than furnishing them to aid in such use, the contract of sale is illegal and void, and he cannot recover the price.[9] It seems that it is otherwise where the crime intended to be perpetrated is merely malum prohibitum or of inferior criminality.[10]

ful whether the connection is sufficient. It appears to us not unreasonable to draw the line as was drawn in Webster v. Munger, 8 Gray, 584, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale, as just explained, the sale is void." GRAVES v. JOHNSON, supra, per Holmes, J. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Cent. Dig. § 464.*

[8] Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Waymell v. Reed, 5 Term R. 599; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Arnot v. Coal Co., 68 N. Y. 566, 23 Am. Rep. 190; Foster v. Thurston, 11 Cush. (Mass.) 322; Skiff v. Johnson, 57 N. H. 475; Banchor v. Mansel, 47 Me. 58. Concealing and disguising form of liquor sold, in order to evade the law. Aiken v. Blaisdell, 41 Vt. 655. In Massachusetts the court has shown an inclination to follow the English rule on this point. In McIntyre v. Parks, 3 Metc. (Mass.) 207, it was held that the bare fact of knowledge on the part of the vendor of the vendee's unlawful intent was not enough to avoid the sale; but this case, though not overruled, was criticised in Webster v. Munger, 8 Gray (Mass.) 584. And see GRAVES v. JOHNSON, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446, Throckmorton Cas. Contracts, 294; Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Sampson v. Townsend, 25 La. Ann. 78; Fishel v. Bennett, 56 Conn. 40, 12 Atl. 102. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Cent. Dig. § 464.*

[9] Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439: Tatum v. Kelley, 25 Ark. 209, 94 Am. Dec. 717; Lightfoot v. Tenant, 1 Bos. & P. 556; Langton v. Hughes, 1 Maule & S. 593; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Howell v. Stewart, 54 Mo. 400; Russell v. Post, 138 U. S. 425, 11 Sup. Ct. 353, 34 L. Ed. 1009. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Cent. Dig. § 464.*

[10] Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Hodgson v. Temple, 5 Taunt. 181; Howell v. Stewart, 54 Mo. 404. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Cent. Dig. § 464.*

If the particular circumstances do not bring the contract of sale within any of the cases mentioned above, then, according to the weight of authority in this country, the contract of sale is not illegal merely because the vendor knew that the goods were intended to be used for an unlawful purpose.[11] "The law," it is said in a New York case, "does not punish a wrongful intent when nothing is done to carry that intent into effect; much less bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily per se a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money."[12] In accordance with this principle a contract by which a person sells his property and business good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade.[13]

Same—Loan

According to the weight of authority, if a person lends money to another for the express purpose of enabling the borrower to use it

[11] Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580; Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439; Bickel v. Sheets, 24 Ind. 1; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154 (but see Territt v. Bartlett, 21 Vt. 184; McConihe v. McMann, 27 Vt. 95); Walker v. Jeffries, 45 Miss. 160; Webber v. Donelly, 33 Mich. 469; Cheney v. Duke, 10 Gill & J. (Md.) 11; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Hedges v. Wallace, 2 Bush (Ky.) 442, 92 Am. Dec. 497; Armfield v. Tate, 29 N. C. 258; Rose v. Mitchell, 6 Colo. 102, 45 Am. Rep. 520; McKinney v. Andrews, 41 Tex. 363 (but see Roquemore v. Alloway, 33 Tex. 461); Howell v. Stewart, 54 Mo. 400; Delavina v. Hill, 65 N. H. 94, 19 Atl. 1000; Gambs v. Sutherland's Estate, 101 Mich. 355, 59 N. W. 652; Goodall v. Brewing Co., 56 Ohio St. 257, 46 N. E. 983; Hollenberg Music Co. v. Berry, 85 Ark. 9, 106 S. W. 1172, 122 Am. St. Rep. 17; Washington Liquor Co. v. Shaw, 38 Wash. 398, 80 Pac. 536, 3 Ann. Cas. 153. He who performs labor and furnishes materials for a bar and the room containing it may recover, though he knew they were intended to be used for unlawful purposes. Bryson v. Haley, 68 N. H. 337, 38 Atl. 1006. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Cent. Dig. § 464.*

[12] Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132. *See "Sales," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 101–107; "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. § 464.*

[13] Camors-McConnell Co. v. McConnell (C. C.) 140 Fed. 412; DIAMOND MATCH CO. v. ROEBER, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, Throckmorton Cas. Contracts, 264. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

to accomplish an illegal object, the transaction is illegal, and he cannot recover it.[14] It is not easy to draw any legal distinction in respect to the legality of the transaction between a loan of money to be used for an illegal purpose and a sale of goods to be so used, and probably there is none. In a leading case it is said: "The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered, but otherwise if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct. * * * In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act—be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man." [15]

[14] Cannan v. Bryce, 3 Barn. & Ald. 179; McKinnell v. Robinson, 3 Mees. & W. 435; TYLER v. CARLISLE, 79 Me. 210, 9 Atl. 856, 1 Am. St. Rep. 301, Throckmorton Cas. Contracts, 297; White v. Buss, 3 Cush. (Mass.) 448; Ruckman v. Bryan, 3 Denio (N. Y.) 346; Peck v. Briggs, 3 Denio (N. Y.) 107; Cutler v. Welsh, 43 N. H. 497; Wright v. Crabbs, 78 Ind. 487; Mordecai v. Dawkins, 9 Rich. (S. C.) 262; Williamson v. Baley, 78 Mo. 636; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Critcher v. Holloway, 64 N. C. 526; Viser v. Bertrand, 14 Ark. 267; White v. Wilson's Adm'rs, 100 Ky. 367, 38 S. W. 495, 37 L. R. A. 197. It has been said, however, that money, though loaned for the purpose of being used for gambling purposes, may be recovered, if it was not in fact so used. TYLER v. CARLISLE, supra. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–464.*

[15] TYLER v. CARLISLE, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301, Throckmorton Cas. Contracts, 297. And see Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Plank v. Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Jackson v. Bank, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; Howell v. Stewart, 54 Mo. 400; Lyon v. Respass, 1 Litt. (Ky.) 133; Lewis v. Alexander, 51 Tex. 578; Waugh v. Beck, 114 Pa. 422, 6 Atl. 923, 60 Am. Rep. 354; Jones v. Bank, 9 Heisk. (Tenn.) 455; Hines v. Union Savings Bank & Trust Co., 120 Ga. 711, 48 S. E. 120. A loan of money, intended to pay lost bets, has been held to be recoverable. "The mischief had been completed," it was said in such a case. "The illegal act had been carried out before the money was lent." Pyke's Case, 8 Ch. Div. 756. And see Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747. *See "Gaming," Dec. Dig. (Key-No.) § 18; Cent. Dig. §§ 36–38.*

Unlawful Intention on One Side Only

Where one of the parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into the contract in ignorance of his intention, the innocent party is entitled to full benefits under the contract.[16] In the case of contracts of sale for future delivery, for instance, if one of the parties intends a bona fide sale, he may enforce the contract, though the other party may have intended no actual sale, but merely an illegal speculation on future prices.[17]

On the other hand, if the contract is still executory, he is not bound to go on with it, but may avoid it at his option.[18] Thus where, in an action for breach of an agreement by the defendant to let to plaintiff a set of rooms, it appeared that the plaintiff intended to use the rooms for the purpose of delivering blasphemous lectures, which were unlawful under a statute, though the defendant was not aware of such a purpose when the agreement was made, and he afterwards refused to allow the plaintiff to use the rooms, it was held that he was entitled to avoid the contract.[19]

SAME—PROMISES TO PAY MONEY DUE ON ILLEGAL TRANSACTIONS

181. The effect of a promise to pay money due or to become due upon an illegal transaction may be stated as follows:

(a) Where the transaction was illegal in the strict sense, and not merely void and unenforceable, the promise, not being in the form of a negotiable instrument, is void, whether under seal or not.

(b) Where the transaction was not illegal, but merely void and unenforceable, a parol promise, not being in the form of a negotiable instrument, is void as without consideration; but a promise under seal is valid.

[16] Pixley v. Boynton, 79 Ill. 351; Quirk v. Thomas, 6 Mich. 76; Scanlon v. Warren, 169 Ill. 142, 48 N. E. 410. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

[17] Williams v. Tiedemann, 6 Mo. App. 269; Pixley v. Boynton, 79 Ill. 351; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; post, p. 429. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

[18] Cowan v. Milbourn, L. R. 2 Exch. 230; Church v. Proctor, 66 Fed. 240, 13 C. C. A. 426. And see Clay v. Yates, 1 Hurl. & N. 78. But see O'Brien v. Brietenbach, 1 Hilt. (N. Y.) 304. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

[19] Cowan v. Milbourn, L. R. 2 Exch. 230. *See "Contracts," Dec. Dig. (Key-No.) § 102; Cent. Dig. §§ 462–467.*

(c) Where the promise is in the form of a negotiable instrument the above rules still apply as between the immediate parties, and as against all persons who are not bona fide purchasers for value. In the hands of bona fide purchasers for value the instrument is valid, whether the transaction was illegal or merely void, unless a statute declares that the instrument shall be void.

Where a promise has been given to secure the payment of money due or about to become due upon an illegal transaction, the validity of such a promise, as between the immediate parties, or others occupying the same position, is based upon two considerations: (1) Whether the transaction was illegal or merely void, and (2) whether or not the promise is made under seal. Where the promise is given in the form of a negotiable instrument, a further question arises as to its value in the hands of third parties, but it will prevent confusion if we treat of the latter question separately.

There is a distinction, not very easy to analyze, but of considerable practical importance, between cases in which the common law or statutes make an object illegal, and cases in which they make it merely void. The effect of the difference is this: that in the one case the promise is regarded as given upon an illegal consideration, while in the other it is regarded as given on no consideration at all. In the first case everything connected with the transaction is "tainted with illegality," while in the second collateral contracts arising out of the avoided transaction are, under certain circumstances, supported.

In cases where the transaction is illegal, a promise, even under seal, given to secure the payment of money due upon it, is void. In an action upon a covenant to pay money, in which the defense was that the covenant was security for the payment of a sum of money due upon a purchase of land conveyed for a purpose prohibited by statute, the court of exchequer chamber, reversing the judgment of the queen's bench, held that the illegality, when proved, tainted the subsequent promise, and that this was not a simple promise to pay money, but that it "springs from and is the creature of the illegal agreement."[20] It will be noticed that in the case mentioned the

[20] Fisher v. Bridges, 3 El. & Bl. 642. And see Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Claflin v. Torlina, 56 Mo. 369; Howe v. Litchfield, 3 Allen (Mass.) 443; Stanton v. Allen, 5 Denio (N. Y.) 435, 49 Am. Dec. 282; Holden v. Cosgrove, 12 Gray (Mass.) 216; Hall v. Gavitt, 18 Ind. 390; Crossley v. Moore, 40 N. J. Law, 27; Chancely v. Bailey, 37 Ga. 532, 95 Am. Dec. 350; Coulter v. Robertson, 14 Smedes & M. (Miss.) 18. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 478–497.*

promise was under seal, but that made no difference; for, although want of consideration will not defeat a sealed contract, the seal will not prevent the contract from being void if the consideration, where there was a consideration, was illegal. The objection on the ground of illegality is "rather that of the public, speaking through the court, * * * not from any consideration of the moral position and rights of the parties, but upon grounds of public policy." [21]

Where the consideration is not illegal, but the transaction is merely void, a promise given to pay money due upon such a transaction is based upon no consideration at all. If made under seal, it is binding, for no consideration is then necessary; but, if made by parol, it is void. Where a municipal corporation, for instance, borrowed money, and gave a mortgage, which a statute declared it unlawful for them to give without complying with certain conditions which they failed to observe, it was held that, though the mortgage was invalid, the corporation was liable on its covenant therein to repay the money it had received.[22] So, also, in case of promises of payment made in consideration of past illicit cohabitation, the promises are invalid if made by parol; not on the ground that the consideration is illegal, but because there is in fact no consideration at all.[23] A bond given upon such a past consideration, because of the seal, would be binding.[24]

It is often a difficult question to determine whether a given contract is illegal or merely void, and there is much direct conflict in the decisions. Of course there can be no question but that it is illegal where it involves the commission of a crime which is malum in se, or, it seems, where it tends to the prejudice of the public, and is void because against public policy; [25] but it is not so easy to declare a transaction illegal in the strict sense, where it is only unlawful because prohibited by statute. In an English case it was held that a

[21] Lyon v. Waldo, 36 Mich. 345, 353. See Parks v. McKamy, 3 Head (Tenn.) 297; Wooden v. Shotwell, 23 N. J. Law, 465; Buffendeau v. Brooks, 28 Cal. 641; Seidenbender v. Charles' Adm'rs, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 478–497.*

[22] Payne v. Mayor of Brecon, 8 Hurl. & N. 579. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 478–497.*

[23] Beaumont v. Reeve, 8 Q. B. 483. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[24] Ayerst v. Jenkins, L. R. 16 Eq. 275. *See "Contracts," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 512–514.*

[25] BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, Throckmorton Cas. Contracts, 290; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159. *See "Contracts," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 681–700.*

note given to secure the payment of money under a wagering contract did not take its inception in illegality within the meaning of the rule we have been discussing. "There is no penalty attached to such a wager," it was said. "It is not in violation of any statute, nor of the common law, but is simply void; so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all." [26] In those of our states where wagers are held contrary to public policy, even where there is no statute prohibiting them, the ruling on this point would be different.[27]

An assignee of an illegal contract not negotiable stands in the same position as his assignor and may not obtain any relief to which his assignor was not entitled.[28]

Negotiable Instruments

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties, but the effect upon subsequent holders of the instrument. A negotiable instrument given upon an illegal transaction is like any other simple contract as between the immediate parties, and cannot be enforced unless it has passed into the hands of a bona fide purchaser for value.[29] Whether it can be enforced in the latter event will depend on the circumstances. The position of such a purchaser may be shortly stated as follows:

(1) If the transaction in which the instrument was given was not illegal, but merely void, so that the instrument is based, not on an illegal consideration, but on no consideration at all, it may be enforced by one who purchased the same for value before maturity, and without notice of the want of consideration. In such a case it is to be presumed, prima facie, that the holder paid value, and had no notice of want of consideration.[30]

[26] Fitch v. Jones, 5 El. & Bl. 245. See, also, Thacker v. Hardy, 4 Q. B. Div. 685. *See "Contracts," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 681–700.*

[27] Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; ante, p. 346. *See "Contracts," Dec. Dig. (Key-No.) § 136; Cent. Dig. §§ 681–700.*

[28] Benson v. Bawden, 149 Mich. 584, 113 N. W. 20, 13 L. R. A. (N. S.) 721. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[29] Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172. *See "Bills and Notes," Dec. Dig. (Key-No.) § 375; Cent. Dig. §§ 971–981; "Gaming," Cent. Dig. § 44.*

[30] Norton, Bills & N. (3d Ed.) 327, 332; Mechanics' & Traders' Nat. Bank v. Crow, 60 N. Y. 85; Harger v. Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Little v. Mills, 98 Mich. 423, 57 N. W. 266. *See "Bills and Notes," Dec. Dig. (Key-No.) § 375; Cent. Dig. §§ 971–981.*

(2) If the transaction in which the instrument was given was illegal, unless the illegality is by force of a statute which renders the instrument absolutely void, a bona fide holder for value may enforce it. "If the legislature has declared that the illegality of the contract or consideration shall make the note void, the defendant may set up that defense, though the note be in the hands of a bona fide holder;[81] but unless it has been so expressly declared by the legislature, illegality of consideration will be no defense against a bona fide holder, without notice, and for sufficient consideration, unless he obtained the note after it became due."[82] In such a case, however, the ordinary presumption in favor of the holder does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder must show that he paid value for the instrument; and even then, if it is shown that he knew of the illegality, he cannot recover.[83] Most courts even hold that the burden is on the holder to show that he had no notice of the illegality.[84]

[81] City of Aurora v. West, 22 Ind. 88, 85 Am. Dec. 413; Lagonda Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634; Meadow v. Bird, 22 Ga. 246; Unger v. Boas, 13 Pa. 601; Snoddy v. Bank, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918; Harper v. Young, 112 Pa. 419, 3 Atl. 670; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984; Lucas v. Waul, 12 Smedes & M. (Miss.) 157; Faris v. King, 1 Stew. (Ala.) 255; Traders' Bank v. Alsop, 64 Iowa, 97, 19 N. W. 863. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 373, 375; Cent. Dig. §§ 966–981.*

[82] Vallett v. Parker, 6 Wend. (N. Y.) 615; Town of Eagle v. Kohn, 84 Ill. 292; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; Glenn v. Bank, 70 N. C. 191; Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600; Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57; Root v. Merriam (C. C.) 27 Fed. 909; Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Shaw v. Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474; Thorne v. Yontz, 4 Cal. 321; Meadow v. Bird, 22 Ga. 246; Johnston v. Dickson, 1 Blackf. (Ind.) 256; Rockwell v. Charles, 2 Hill (N. Y.) 499; Knox v. White, 20 La. Ann. 326; Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361. But see Cunningham v. Bank, 71 Ga. 400, 51 Am. Rep. 266. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 373, 375; Cent. Dig. §§ 966–981.*

[83] Note 81, supra.

[84] Norton, Bills & N. (3d Ed.) 333; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; McDonald v. Aufdengarten, 41 Neb. 40, 59 N. W. 762; State Nat. Bank v. Bennett, 8 Ind. App. 679, 36 N. E. 551. *See "Contracts," Dec. Dig. (Key-No.) § 141; Cent. Dig. § 1760.*

SAME—RELIEF OF PARTY TO UNLAWFUL AGREEMENT

182. In no case can an action be maintained to enforce an illegal agreement.

183. Where an agreement has been executed in whole or in part by the payment of money or the transfer of other property, the court will not generally lend its aid to recover it back. The rule is that the court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction. This rule is subject to exceptions as follows, where the action is brought, not to enforce the agreement, but in disaffirmance of it:

EXCEPTIONS—(a) In some cases a locus pœnitentiæ remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered.

(b) Where the parties are not in pari delicto, the one who is less guilty may recover what he has parted with, as

(1) Where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure.

(2) Where the law which makes the agreement unlawful was intended for the protection of the party asking relief.

184. A broker, or other agent, employed to carry out an illegal transaction, cannot recover compensation, reimbursement, or indemnity in respect to the transaction, if he was privy to the principal's unlawful purpose.

185. No recovery may be had upon a quantum meruit or quantum valebant for benefits received under an illegal contract.

It is a well-settled rule that in no case will the court lend its aid to the enforcement of an illegal agreement. Further than this, if the agreement has been executed, in whole or in part, by the payment of money or transfer of property, the court will not, as a rule, entertain an action to recover it back.[85] The rule is necessary on the ground of public policy. "The objection," said Lord Mansfield in a leading case, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill

[85] Harriman v. Northern Securities Co., 197 U. S. 244, 25 S. Ct. 493, 49 L. Ed. 739. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, 'potior est conditio defendentis.'" [36]

As we have said, therefore, a party to an illegal agreement cannot, under any circumstances, come into a court of law or equity and ask to have his illegal objects carried out; nor, as a rule, can he ask the court to relieve him from the effect of his agreement. He cannot set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.[37] This

[36] Holman v. Johnson, 1 Cowp. 341. See, also, Frost v. Gage, 3 Allen (Mass.) 560; Shenk v. Phelps, 6 Ill. App. 612; Jameson v. Carpenter, 68 N. H. 62, 36 Atl. 554; Winchester Electric Light Co. v. Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; Crichfield v. Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; Todd v. Ferguson, 161 Mo. App. 624, 144 S. W. 158. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[37] Begbie v. Sewage Co., L. R. 10 Q. B. 499; Barclay v. Pearson [1893] 2 Ch. 154; Scott v. Brown [1892] 2 Q. B. 724; Frost v. Gage, 3 Allen (Mass.) 560; Emery v. Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819; Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; Gotwalt v. Neal, 25 Md. 434; Roman v. Mali, 42 Md. 513; Bartle v. Coleman, 6 Wheat. 475, 5 L. Ed. 309; Miller v. Marckle, 21 Ill. 152; Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; St. Louis, V. & T. H. R. Co. v. Railroad Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S. W. 879; Minzesheimer v. Doolittle, 60 N. J. Eq. 394, 45 Atl. 611. Where persons are engaged in an unlawful transaction, the court will not entertain a suit for an accounting in respect to the profits thereof. Jackson v. McLean (C. C.) 36 Fed. 213; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Atwater v. Manville, 106 Wis. 64, 81 N. W. 985. But if money has been actually paid to an agent for the use of his principal, the legality of the transaction of which it was the fruit does not affect the right of the principal to recover it out of the agent's hands, on the ground that, though the law would not have assisted the principal by enforcing the recovery of it from the party by whom it was paid,

rule is expressed in the maxim, "In pari delicto potior est conditio defendentis;" that is to say, where the parties are equally in fault the condition of the defendant is the better. The law, in such a case, will leave the parties where it finds them.[88]

Where, however, the contract sought to be enforced has no direct correction with the illegal act, but is merely collateral to it, so that the plaintiff does not require the aid of the illegal act to establish his claim, he may recover.[89]

There are some exceptional cases as stated in the black-letter text, in which a man may be relieved from an illegal agreement. These will be treated more fully.

Locus Pœnitentiæ

Although there is some difference of opinion on the subject, it is safe to say that in some cases of illegal agreements, at least, if they are not mala in se, but merely mala prohibita, a locus pœnitentiæ remains, and that, while the illegal object has not been carried out by performance of the agreement, money paid or

yet, when that contract is at an end, the agent, whose liability arises solely from having received the money for another's use, can have no right to retain it. Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russell, Id. 295; McBlair v. Gibbes, 17 How. 236, 15 L. Ed. 132; Brady v. Horvath, 167 Ill. 610, 47 N. E. 757; Hertzler v. Geigley, 196 Pa. 419, 46 Atl. 366, 79 Am. St. Rep. 724; Hardy v. Jones, 63 Kan. 8, 64 Pac. 969, 88 Am. St. Rep. 223. In Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732, among other cases, the principle was applied so as to allow one member of a firm formed for the purpose of illegal transactions to recover from the other member his share of the profits. See, also, in support of this doctrine, State v. Railroad Co., 34 Md. 344, at page 365; Bonsfield v. Wilson, 16 Mees. & W. 185; Haacke v. Knights of Liberty, 76 Md. 429, 25 Atl. 422; Daniels v. Barney, 22 Ind. 207; Peters v. Grim, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Portsmouth Brewing Co. v. Mudge, 68 N. H. 462, 44 Atl. 600; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348; Andrews v. Association, 74 Miss. 362, 20 South. 837, 60 Am. St. Rep. 509. There is certainly little reason in the distinction, and other cases have refused to recognize it. Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117 (limiting, if not overruling, Brooks v. Martin, supra). One sued on an implied contract for services rendered may under a general denial show an express contract, and it is immaterial that such express contract was unlawful. Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[88] Howson v. Hancock, 8 Term R. 575; Perkins v. Savage, 15 Wend. (N. Y.) 412; Burt v. Place, 6 Cow. (N. Y.) 431; Johnson v. Berry, 20 S. D. 133, 104 N. W. 1114, 1 L. R. A. (N. S.) 1159. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[89] Electrova Co. v. Spring Garden Ins. Co., 156 N. C. 232, 72 S. E. 306, 35 L. R. A. (N. S.) 1216. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

goods delivered under it may be recovered.[40] "It best comports with public policy to arrest the illegal proceeding before it is consummated."[41] In a leading English case on this point the plaintiff had made a fictitious assignment of goods to a third party, to defraud his creditors, and the defendant, with a knowledge of the circumstances, had taken a bill of sale of the goods from the assignee, and afterwards, though the plaintiff demanded them back, had caused them to be put up at auction and sold. Nothing further had been done in respect of the fraud contemplated against the creditors, and the plaintiff was allowed to recover, on the ground that, as the illegal purpose was not carried out, there was a locus pœnitentiæ. "If money is paid," it was said in that case, "or goods delivered, for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits until the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."[42]

So, also, in a case where persons had each deposited money with another on a wager, and one of them, after a decision of the wager against him, but before the money was paid over, demanded it back, he was allowed to recover.[43]

[40] **TYLER v. CARLISLE**, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301, Throckmorton Cas. Contracts, 297; Barclay v. Pearson, [1893] 2 Ch. 154; Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Peters v. Grim, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Skinner v. Henderson, 10 Mo. 205; Adams Exp. Co. v. Reno, 48 Mo. 264; Souhegan Nat. Bank v. Wallace, 61 N. H. 24; Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; Stansfield v. Kunz, 62 Kan. 797, 64 Pac. 614. But see Knowlton v. Spring Co., 57 N. Y. 518. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[41] Stacy v. Foss, 19 Me. 335, 36 Am. Dec. 755. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[42] Taylor v. Bowers, 1 Q. B. Div. 291. See, also, Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Gowan's Adm'r v. Gowan, 30 Mo. 472. The principle of Taylor v. Bowers, supra, as well as its application, was questioned in Kearley v. Thomson, 24 Q. B. Div. 742, 746. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[43] Hampden v. Walsh, 1 Q. B. Div. 189. And see Fisher v. Hildreth, 117 Mass. 558; Bernard v. Taylor, 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; Lewis v. Bruton, 74 Ala. 317, 49 Am. Rep. 816; Weaver v. Harlan, 48 Mo. App. 319; McDonough v. Webster, 68 Me. 530; McAllister v. Hoffman, 16 Serg. & R. (Pa.) 147, 16 Am. Dec. 556; TYLER v. CARLISLE, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301, Throckmorton Cas. Contracts, 297; Stacy v. Foss, 19 Me. 335, 36 Am. Dec. 755; Wheeler v. Spencer, 15 Conn. 28; House v. McKenney, 46 Me. 94; Shannon v. Baumer, 10 Iowa, 210; Hodson v. Terrill, 1 Cromp. & M. 797; Hastelow v. Jackson, 8 Barn. & C. 221; Martin v. Hewson, 10 Exch. 737; Strachan v. Stock Exchange [1895] 2 Q. B. 329;

On the other hand, if the illegal object has been effected by the mere deposit of the money or goods, they cannot be recovered. And it seems that, if the illegal contract has been performed in part, there can be no recovery.[44] In an English case the defendant had agreed with the plaintiff to go bail for him for a specified time if the plaintiff would deposit with him the amount of the bail as an indemnity against his (plaintiff's) possible default, the defendant undertaking to return the money at the expiration of the specified time. Before the time had expired, the plaintiff sued for the money, on the ground that the agreement was illegal, and that he was entitled to rescind it. It was held that the illegal purpose was effected when the public lost "the protection which the law affords for securing the good behaviour of the plaintiff;" for, as it was said, "when a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound, at his peril, to see that his principal obeys the order of the court. * * * But if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed." [45]

So, also, where a person placed money to the credit of a corporation to give it a fictitious credit in case of inquiries, the money to be returned to him at a specified time, and he sued to recover the same after the company had gone into liquidation, he was not allowed to recover, because "the object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up." [46]

Pabst Brewing Co. v. Liston, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275; Falkenberg v. Allen, 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494. In many states by statute persons who have lost money by gambling may, under certain circumstances, recover it back. In some states by statute any money betted or staked is forfeit. Ferguson v. Yunt, 13 S. D. 120, 82 N. W. 509. In some by statute a stakeholder on notice must return it. Turner v. Thompson, 107 Ky. 647, 55 S. W. 210. *See "Gaming," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 13, 57–61.*

[44] Keasley v. Thomson, 24 Q. B. Div. 742; Ullman v. Association, 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606; Anson, Cont. (8th Ed.) 219. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[45] Herman v. Jenchner, 15 Q. B. Div. 561, overruling Wilson v. Strugnell, 7 Q. B. Div. 548. Otherwise where an agreement to indemnify the signer of a bail bond against loss is not against public policy. Maloney v. Nelson, 12 App. Div. 545, 42 N. Y. Supp. 418; Moloney v. Same, 158 N. Y. 351, 53 N. E. 31. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[46] In re Great Britain Steamboat Co., 26 Ch. Div. 616. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

Par Delictum

If the party asking to be relieved from the effect of an illegal agreement was induced to enter into the agreement by means of fraud, he is not always regarded as being in pari delicto with the other party, and the court may relieve him. As illustrating this rule is a case in which a party sued in equity to set aside a conveyance made in pursuance of an agreement which was illegal on the ground of champerty. It was urged that the parties were in pari delicto, but the court, being satisfied that the plaintiff had been induced to enter into the agreement by the fraud of the defendant, held that he was entitled to relief. "Where the parties," it was said, "to a contract against public policy, or illegal, are not in pari delicto (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him." [47]

So, where the party asking relief was induced to enter into the agreement under the influence of duress, strong pressure, or undue influence.[48] "This is not a case of par delictum," it was said by an English judge in reference to a case of duress. "It is oppression on one side and submission on the other. It never can be predicated as par delictum, when one holds the rod and the other

[47] Reynell v. Sprye, 1 De Gex, M. & G. 660. See, also, Ford v. Harrington, 16 N. Y. 285; Roman v. Mali, 42 Md. 513; Green v. Corrigan, 87 Mo. 359; Davidson v. Carter, 55 Iowa, 117, 7 N. W. 466; Barnes v. Brown, 32 Mich. 146; Belding v. Smythe, 138 Mass. 530; Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, and note, 113 Am. St. Rep. 709; Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499; Depue v. Swift 1904 Clothes Washer Co., 144 Mo. App. 656, 129 S. W. 230. So it has been held that money paid to a marriage broker may be recovered by the party who paid it, as obtained by constructive fraud; and that she will not be regarded as in pari delicto with him. Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343; Wenniger v. Mitchell, 139 Mo. App. 420, 122 S. W. 1130. *See "Contracts," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 684–700.*

[48] Reynell v. Sprye, 1 De Gex, M. & G. 660; Baehr v. Wolf, 59 Ill. 470; Richardson v. Crandall, 48 N. Y. 348; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Green v. Corrigan, 87 Mo. 359; Roman v. Mali, 42 Md. 513; Curtis v. Leavitt, 15 N. Y. 9; Mount v. Waite, 7 Johns. (N. Y.) 434; WHITE v. BANK, 22 Pick. (Mass.) 181, Throckmorton Cas. Contracts, 298; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Woodham v. Allen, 130 Cal. 194, 62 Pac. 398; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692; Colby v. Title Ins. & Trust Co., 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515. Though a mortgage given by a father to prevent the prosecution of his son for a crime is illegal, he may sue to set it aside. Having executed it under strong pressure, he is not in pari delicto with the mortgagee. Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419. *See "Contracts," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 684–700.*

bows to it." [49] In a case, for instance, where a debtor sued to recover an additional sum, paid by him to one of his creditors, in fraud of the others, to induce the former to agree to a composition, he was allowed to recover, it being shown that the decision of several other creditors depended on the defendant's acceptance or rejection of the offer of a composition. "It is said that the parties are in pari delicto," said the court. "It is true that both are in delicto, because the act is a fraud upon the other creditors; but it is not par delictum, because the one has power to dictate, the other no alternative but to submit." [50] So, if one of the parties in the execution of the contract, acted in violation of law, but without the knowledge of the other, the contract may be enforced by the innocent party; [51] as, for example, in the case of notes or other contracts executed by one party on Sunday, where the other party did not know they had been executed on that day.[52]

The parties are not to be regarded as being in pari delicto where the agreement is merely malum prohibitum, and the law which makes it illegal was intended for the protection of the party asking relief.[53] As illustrating this rule are cases in which banks or other corporations are prohibited under penalties from issuing bills or other securities, but no penalty is imposed on persons

[49] Smith v. Cuff, 6 Maule & S. 160, at page 165. *See "Contracts," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 684–700.*

[50] Atkinson v. Denby, 6 Hurl. & N. 778, 7 Hurl. & N. 934. And see Solinger v. Earle, 82 N. Y. 393; Crossley v. Moore, 40 N. J. Law, 27; Brown v. Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 684–700.*

[51] Collins v. Collins, 139 Iowa, 703, 117 N. W. 1089, 18 L. R. A. (N. S.) 1176, 16 Ann. Cas. 630. *See "Contracts," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 684–700.*

[52] Collins v. Collins, 139 Iowa, 703, 117 N. W. 1089, 18 L. R. A. (N. S.) 1176, 16 Ann. Cas. 630. *See "Sunday," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 30–34.*

[53] In Bowditch v. Insurance Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474, it was held that a statute providing that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same," was intended to protect the company and policy holders from the dishonesty or self-interest of the officers, and did not render a loan to an officer illegal, so as to prevent the company from recovering on his promise to repay. And see WHITE v. BANK, 22 Pick. (Mass.) 181, Throckmorton Cas. Contracts, 298; President, etc., of Atlas Bank v. President, etc., 3 Metc. (Mass.) 581; Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; Browning v. Morris, 2 Cowp. 790; Smith v. Bromley, 2 Doug. 696; Clarke v. Lumber Co., 59 Wis. 655, 18 N. W. 492; Mason v. McLeod, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327. *See "Contracts," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 684–700.*

who receive the illegal securities. In such cases it is held that the law creating the illegality is to protect the public against the prohibited securities, that the corporation issuing them is the only offender, and that persons who receive them may recover the money paid for them. They are not in pari delicto. "The corporation issuing the bills contrary to law and against penal sanctions is deemed more guilty than the members of the community who receive them, whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them." [54]

If a broker or other agent is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal.[55] Not only is this true, but it has been held that any express promise made by the principal to reimburse him is void.[56] This, of course, does not apply where a broker is employed to

[54] Thomas v. City of Richmond, 12 Wall. 349, 20 L. Ed. 453; Oneida Bank v. Bank, 21 N. Y. 490; Smith v. Bromley, 2 Doug. 696. And see Herring v. Cumberland Lumber Co., 159 N. C. 382, 74 S. E. 1011, 42 L. R. A. (N. S.) 64. Where a statute commands certain parties to do or prohibits them from doing certain acts, and prescribes penalties for their violation of its commands, the court may not inflict other penalties for its violation on other parties not named in the law by avoidance of their contracts. Hanover Nat. Bank v. Bank, 109 Fed. 421, 48 C. C. A. 482. *See "Contracts," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 684–700.*

[55] Greenh. Pub. Pol. 110 (collecting the cases); Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Foss v. Cummings, 149 Ill. 353, 36 N. E. 553; Kirkpatrick v. Adams (C. C.) 20 Fed. 287; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Hooker v. Knab, 26 Wis. 511; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Fareira v. Gabell, 89 Pa. 89; Cunningham v. Bank, 71 Ga. 400, 51 Am. Rep. 266; Stewart v. Schall, 65 Md. 308, 4 Atl. 399, 57 Am. Rep. 327; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Colderwood v. McCrea, 11 Ill. 543; Connor v. Black, 119 Mo. 126, 24 S. W. 184; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 39 Am. St. Rep. 302; Rogers v. Marriott, 59 Neb. 759, 82 N. W. 21. See, also, Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Tiffany, Ag. 459. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[56] Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Smith v. David B. Crockett Co., 85 Conn. 282, 82 Atl. 569, 39 L. R. A. (N. S.) 1148 (contract with salesman contemplating the bribing of purchasing agents). *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

make contracts the illegality of which depends on the intention of his principal, and the broker is not aware of such intent; as, for instance, where a stock or grain broker is employed to sell stock or grain on the exchange for future delivery, and he is not aware of the fact that his principal intends, not an actual sale and delivery, but a mere gambling on the rise and fall of prices.[57] But where money or property is delivered by a principal to an agent for the purpose of executing an illegal contract, such money or property may be recovered by the principal from the agent so long as it remains in the latter's hands.[58]

Recovery upon Quantum Meruit

Where money is paid, goods are sold, or services rendered, under a contract merely void, but not illegal, an implied assumpsit lies for the money paid, or for the value of the goods sold or services rendered; but where the contract is illegal because contrary to positive law or against public policy, an action does not lie to recover the money paid on it, or the value of the goods sold or services rendered under it.[59] To permit a recovery upon a quan-

[57] Rountree v. Smith, 108 U. S. 269, 2 Sup. Ct. 630, 27 L. Ed. 722; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Edwards v. Hoeffinghoff (C. C.) 38 Fed. 635; Lehman v. Feld (C. C.) 37 Fed. 852; Boyd v. Hanson (C. C.) 41 Fed. 174; Pape v. Wright, 116 Ind. 502, 19 N. E. 459; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Bartlett v. Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928. A mere expectation on the part of the principal and broker, in sales for future delivery, that purchasers from the principal may be willing to adjust the transactions by paying or receiving differences, when there is no agreement to that effect, does not render the contract illegal. Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; ante, p. 344. In England, where gaming and wagering contracts are held not illegal at common law, but were by statute rendered null and void, but not illegal, money paid by an agent in pursuance of such a contract was recoverable from his principal. Thacher v. Hardy, 4 Q. B. D. 685. And see Read v. Anderson, 13 Q. B. D. 779; Seymour v. Bridges, 14 Q. B. D. 460; Knight v. Lee, [1893] 1 Q. B. D. 41. This has since been changed by statute. Tatam v. Reeve, [1893] 1 Q. B. 44. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[58] Cheuvront v. Horner, 62 W. Va. 476, 59 S. E. 964; Hertzler v. Geigley, 196 Pa. 419, 46 Atl. 366, 79 Am. St. Rep. 724; Ware v. Spinney, 76 Kan. 289, 91 Pac. 787, 13 L. R. A. (N. S.) 267, 13 Ann. Cas. 1181. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700; "Intoxicating Liquors," Dec. Dig. (Key-No.) § 327; Cent. Dig. §§ 467–473.*

[59] Roller v. Murray, 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913B, 1088; Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161, 16 Ann. Cas. 846. But see White Star Line v. Star Line of Steamers, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551, allowing a recovery upon a quantum meruit for benefits actually received upon disaffirming the illegal contract. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. § 698.*

tum meruit or quantum valebant for benefits received under an illegal contract would result in the indirect enforcement of the contract itself, and, to a large extent at least, would relieve it of any odium or inconvenience, whereas it is the policy of the law to discourage the making of illegal agreements.[60]

CONFLICT OF LAWS

186. IN SPACE. The validity of a contract is as a rule determined by the law of the place where it is made, but if it is to be performed in some other place its validity is as a rule determined by the law of that place.

EXCEPTION—A contract will not be enforced where to enforce it would be injurious to the interest of the state or country where it is sought to be enforced, or of its citizens.

187. IN TIME. An agreement which is illegal when made is not rendered valid by subsequent legislation. On the other hand a change in the law cannot render illegal an agreement which was legal when made, though it may render further performance impossible, and operate as a discharge.

As a general rule, subject to exceptions which we will notice briefly, the legality of a contract is to be determined by the law of the place where it is made and is to be performed. If it is valid there it is valid everywhere. "This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law."[61] A sale of goods, for instance, made and completed by de-

[60] Roller v. Murray, 112 Va. 708, 72 S. E. 665, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913B, 1088. See post, p. 650. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[61] Pearsall v. Dwight, 2 Mass., at page 89, 3 Am. Dec. 35. And see Andrews v. Herriot, 4 Cow. (N. Y.) 508, note (where the earlier cases are collected); Ward v. Vosburgh (C. C.) 31 Fed. 12; Brown v. Finance Co. (C. C.) 31 Fed. 516; Sullivan v. Sullivan, 70 Mich. 583, 38 N. W. 472; Western & A. R. Co. v. Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Central Trust Co. v. Burton, 74 Wis. 329, 43 N. W. 141; Appeal of Fowler, 125 Pa. 388, 17 Atl. 431, 11 Am. St. Rep 902; Atlantic Phosphate Co. v. Ely, 82 Ga. 438, 9 S. E. 170; Fairchild v. Railroad Co., 148 Pa. 527, 24 Atl. 79; Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; O'Regan v. Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484; Thompson v. Taylor, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485; International Harvester Co. of America v. McAdam, 142 Wis. 114, 124 N. W.

livery in one state, where it is valid, will be enforced in another state, though it would have been invalid if made in the latter state.[62] A note executed in one state and free from usury under its laws is valid in another state, although if made in the latter state it would have been usurious and void.[63] A marriage, also, though strictly not a contract, is governed by the same principle. If valid where it is executed, it is valid everywhere.[64] On the other hand, a contract which is invalid where it is made and is to be performed is invalid everywhere.[65] A note, for instance, which is void for usury in the state where it is executed, is void in another state, though, if made in the latter, it would have been valid.[66]

1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614 (containing full discussion of rules). *See "Contracts," Dec. Dig. (Key-No.) §§ 2, 101; Cent. Dig. §§ 2, 41, 145, 455–460; "Sales," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 2; "Vendor and Purchaser, Dec. Dig. (Key-No.) § 2; Cent. Dig. § 2.*

[62] Greenwood v. Curtis, 6 Mass. 377, 4 Am. Dec. 145; Grant v. McLachlin, 4 Johns. (N. Y.) 34; Braun v. Keally, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811; Brinker v. Scheunemann, 43 Ill. App. 659; Dame v. Flint, 64 Vt. 533, 24 Atl. 1051; Claflin v. Meyer, 41 La. Ann. 1048, 7 South. 139; Kerwin v. Doran, 29 Mo. App. 397; Wagner v. Breed, 29 Neb. 720, 46 N. W. 286. *See "Sales," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 2.*

[63] Brown v. Finance Co. (C. C.) 81 Fed. 516; Matthews v. Paine, 47 Ark. 54, 14 S. W. 463; Van Vleet v. Sledge (C. C.) 45 Fed. 743; Mott v. Rowland, 85 Mich. 561, 48 N. W. 638; Staples v. Nott, 128 N. Y. 403. 28 N. E. 515, 26 Am. St. Rep. 480; Buchanan v. Bank, 55 Fed. 223, 5 C. C. A. 83. Note on gaming consideration, valid where it was made and the transaction took place, is enforceable in a state under whose laws it would have been void. Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23. Dealings in futures. Ward v. Vosburgh (C. C.) 81 Fed. 12; Lehman v. Feld, 87 Fed. 852. Sunday contract. McKee v. Jones, 67 Miss. 405, 7 South. 348; Arbuckle v. Reaume, 96 Mich. 243, 55 N. W. 808; Adams v. Gay, 19 Vt. 358; Swann v. Swann (C. C.) 21 Fed. 299; Brown v. Browning, 15 R. I. 422, 7 Atl. 406, 2 Am. St. Rep. 908; O'Rourke v. O'Rourke, 43 Mich. 58, 4 N. W. 531. *See "Usury," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 2–15, 418.*

[64] Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; Sutton v. Warren, 10 Metc. (Mass.) 451; Scrimshire v. Scrimshire, 2 Hagg. Const. 395; Ilderton v. Ilderton, 2 H. Bl. 145; Inhabitants of West Cambridge v. Inhabitants of Lexington, 1 Pick. (Mass.) 507, 11 Am. Dec. 231; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Jackson v. Jackson, 82 Md. 17, 33 Atl. 137, 34 L. R. A. 773. Cf. In re Stall's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776; McLennan v. McLennan, 31 Or. 490, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835. *See "Marriage," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 3, 23.*

[65] Corn Exch. Nat. Bank v. Jansen, 70 Neb. 579, 97 N. W. 814 (holding that suit may not be brought in foreign jurisdiction on instrument by which the contract is evidenced). *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[66] Van Schaick v. Edwards, 2 Johns. Cas. (N. Y.) 355; Matthews v. Paine, 47 Ark. 54, 14 S. W. 463; Meroney v. Association, 112 N. C. 842, 17 S. E. 687. Note void for gaming in France, where it is made, is void in England.

The rule that a contract which is valid where it is made and is to be performed is valid everywhere is subject to exceptions. No state is bound to recognize and enforce a contract which is injurious to its own interests, or to the interests of its citizens, or that contravenes the established public policy of the state.[67] "This exception results from the consideration that the authority of the acts and contracts done in other states, as well as the laws by which they are regulated, are not, proprio vigore, of any efficacy beyond the territories of that state; and whatever effect is attributed to them elsewhere is from comity, and not of strict right. And every independent community will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity. * * * Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; contracts against good morals, or against religion, or against public rights; and contracts opposed to the national policy or national institutions,—are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made." [68] To il-

Robinson v. Bland, 2 Burrows, 1077. And see, for other cases, Touro v. Cassin, 1 Nott & McC. (S. C.) 173, 9 Am. Dec. 680; Tolman Co. v. Reed, 115 Mich. 71, 72 N. W. 1104; Washington Nat. Building, Loan & Inv. Co. v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; Alexander v. Barker, 64 Kan. 396, 67 Pac. 829. Sale made in another state in violation of its liquor laws. Tredway v. Riley, 32 Neb. 495, 49 N. W. 268, 29 Am. St. Rep. 447; Wind v. Iler, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219. Stipulation relieving carrier from liability. Brockway v. Express Co., 168 Mass. 257, 47 N. E. 87. *See "Bills and Notes," Dec. Dig. (Key-No.) § 99; Cent. Dig. § 213; "Usury," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 2–15, 418.*

[67] Williamson v. Postal Telegraph Co., 151 N. C. 223, 65 S. E. 974, where it is said by Clark, C. J.: "To this rule, however, there are well-known exceptions, as follows: First, when the contract is contrary to good morals; second, when the state of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; third, when the contract violates the positive legislation of the state of the forum, that is, contrary to its constitution or statute; and, fourth, when the contract violates the public policy of the state of the forum." And see Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005, refusing to enforce a gambling contract made in another state and valid there. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[68] Story Confl. Law, § 244; Randall v. Protective Union, 43 Neb. 876, 62 N. W. 252. And see Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Davis v. Bronson, 6 Iowa, 410; Kentucky v. Bassford, 6 Hill (N. Y.) 526; Territt v. Bartlett, 21 Vt. 189; Blanchard v. Russell, 13 Mass. 6, 7 Am. Dec. 106; In re Dalpay, 41 Minn. 532, 43 N. W. 564, 6 L. R. A. 103, 16 Am. St. Rep. 729; Savings Bank of Kansas v. Bank (C. C.) 38 Fed. 800; Kilcrease v. Johnson, 85 Ga. 600, 11 S. E. 870; Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473. See, also, Oscanyan v. Arms Co.,

lustrate this exception, a contract made in one country to smuggle goods into another in violation of its laws will not be enforced in the latter country.[69] So also a sale of intoxicating liquors or other goods in one state will not be enforced in another state, where the intention of both parties was to import the goods into the latter state, and sell them in violation of its laws.[70] So of contracts made in a foreign country for future illicit cohabitation and prostitution;[71] and contracts made in another state or nation limiting the liability of common carriers [72] or other public service corporations,[73] where such contracts are contrary to the public policy of the state of the forum.

An exception to the rule that contracts which are invalid where

103 U. S. 261, 26 L. Ed. 539. A contract made in another state, though valid there, will not be enforced if it is opposed to the public policy of the state of the forum. The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; Seamans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; Thompson v. Taylor, 65 N. J. Law, 107, 46 Atl. 567; Bartlett v. Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928; Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; Winward v. Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; Welling v. Association, 56 S. C. 280, 34 S. E. 409; Parker v. Moore, 115 Fed. 799, 53 C. C. A. 369; St. Louis Southwestern Ry. Co. of Texas v. McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346. But enforcement will not be refused merely because the contract would not have been valid if made in the state of the forum. Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; O'Regan v. Same, 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484; International Harvester Co. of America v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614; The Fri, 154 F. 333, 83 C. C. A. 205. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[69] Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Holman v. Johnson, Cowp. 341. See, also, ante, p. 414. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[70] Aiken v. Blaisdell, 41 Vt. 655; Banchor v. Mansel, 47 Me. 58; Webster v. Munger, 8 Gray (Mass.) 584; Davis v. Bronson, 6 Iowa, 410. Or even in the state where the sale was made. GRAVES v. JOHNSON, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 3 Am. St. Rep. 446, Throckmorton Cas. Contracts, 294. *See "Intoxicating Liquors," Dec. Dig. (Key-No.) § 326; Cent. Dig. § 469.*

[71] Walker v. Perkins, 3 Burrows, 1568; Jones v. Randall, Cowp. 37; De Sobry v. De Laistre, 2 Har. & J. (Md.) at page 228, 3 Am. Dec. 535; Robinson v. Bland, 2 Burrows, 1084. Marriage valid where entered into, but incestuous in Pennsylvania, will not be there recognized. U. S. v. Rodgers (D. C.) 109 Fed. 886. *See "Marriage," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 3, 23.*

[72] The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; Carstens Packing Co. v. Southern Pac. Co., 58 Wash. 239, 108 Pac. 613, 27 L. R. A. (N. S.) 975. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[73] Williamson v. Postal Telegraph Co., 151 N. C. 223, 65 S. E. 974. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

they are made are invalid everywhere is in the case of contracts violating the revenue laws. It seems to have been an established doctrine of the common law that a nation will not recognize or enforce the revenue laws of another country, and that the contracts of its own subjects, made to evade or defraud the revenue laws of foreign nations, may be enforced in its own courts.[74] This doctrine has been deprecated by eminent judges and lawyers, and the later cases have shown a tendency to hold the contrary.[75]

The rule stated at the beginning of this paragraph only appliés, it will be noticed, where the contract is to be performed where it is made. Where it is either expressly or by implication to be performed at some other place, "there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, * * * is to be governed by the law of the place of performance." [76]

Change of Law

An agreement which is illegal and void at the time of its inception cannot be rendered valid by subsequent legislation;[77] nor, on

[74] Story, Confl. Law, §§ 245, 256, 257; Boucher v. Lawson, Cas. t. Hardw. 84, 89, 191; Holman v. Johnson, Cowp. 341; Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 94. *See "Courts," Dec. Dig. (Key-No.) §§ 511, 512; Cent. Dig. § 1432; "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[75] Story, Confl. Law, §§ 245, 256, 257. A bill or note void for want of a stamp is void everywhere, though, if the stamp is merely a condition of its admissibility in evidence, this will have no effect outside the jurisdiction. Alves v. Hodgson, 7 T. R. 241; Bristow v. Sequeville, 5 Ex. 275; Fant v. Miller, 17 Grat. (Va.) 47. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[76] Story, Confl. Law, § 280; Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61; Frazier v. Warfield, 9 Smedes & M. (Miss.) 220; Thayer v. Elliott, 16 N. H. 104; First Nat. Bank v. Hall (Pa.) 24 Atl. 665, 30 Am. St. Rep. 823; Liverpool & G. W. Steam Co. v. Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. That a note is governed by the law of the place where it is payable, see Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775; Tenant v. Tenant, 110 Pa. 478, 1 Atl. 532; Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777; Bigelow v. Burnham, 83 Iowa, 120, 49 N. W. 104, 32 Am. St. Rep. 294; Bennett v. Eastern Building & Loan Ass'n, 177 Pa. 233, 35 Atl. 684, 34 L. R. A. 595, 55 Am. St. Rep. 723; Building & Loan Ass'n of Dakota v. Logan, 66 Fed. 827, 14 C. C. A. 133; Hieronymus v. Association (C. C.) 101 Fed. 12; Western Union Telegraph Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; Southern Express Co. v. Gibbs, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24 [cit. Clark on Contracts (1st Ed.) 507]; Zeratello v. Hammerstein, 231 Pa. 56, 79 Atl. 922. Contract to be performed partly in state where made and partly elsewhere. Bartlett v. Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928. *See "Contracts," Dec. Dig. (Key-No.) § 101; Cent. Dig. §§ 455–460.*

[77] HANDY v. ST. PAUL GLOBE PUB. CO., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695, Throckmorton Cas. Contracts, 227;

the other hand, can a change of the law render invalid a contract which was valid when made.[78] Where, however, performance of a contract lawful in its inception is made unlawful by any subsequent legislation or event, the contract is thereby dissolved, unless the statute, to have this effect, would be unconstitutional, as impairing the obligation of contract.[79] So a covenant not to do a lawful thing is repealed by the subsequent passage of a statute compelling it to be done.[80]

Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Mays v. Williams, 27 Ala. 267. Repeal of law does not validate prior invalid contract. Hathaway v. Moran, 44 Me. 67; Hughes v. Boone, 102 N. C. 137, 9 S. E. 286; Robinson v. Barrows, 48 Me. 186; Banchor v. Mansel, 47 Me. 58; Webber v. Howe, 36 Mich. 150, 24 Am. Rep. 590; Anding v. Levy, 57 Miss. 51, 34 Am. Rep. 435; Gilliland v. Phillips, 1 S. C. 152; Bailey v. Mogg, 4 Denio (N. Y.) 60; Ottaway v. Lowden, 55 App. Div. 410, 66 N. Y. Supp. 952; Denning v. Yount, 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103; Wilcox v. Edwards, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913C, 1392 (where, however, it is said that statutes changing the law relating to usury seem to constitute an exception to this rule). Otherwise where contract merely voidable and not void. Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682. And see Hartford Fire Ins. Co. v. Railway Co. (C. C.) 62 Fed. 904. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 480–482.*

[78] Boyce v. Tabb, 18 Wall. 546, 21 L. Ed. 757; Jump v. Johnson (Ky.) 13 S. W. 843; Richardson v. Campbell, 34 Neb. 181, 51 N. W. 733, 33 Am. St. Rep. 633; Knight v. Lée, [1893] 1 Q. B. 41; Stephens v. Railway Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 480–482.*

[79] United States v. Dietrich (C. C.) 126 Fed. 671 [cit. Clark on Contracts (1st Ed.) 507]; American Mercantile Exchange v. Blunt, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 480–482.*

[80] Meade v. Lamarche, 150 App. Div. 42, 134 N. Y. Supp. 479. *See "Contracts," Dec. Dig. (Key-No.) § 105; Cent. Dig. §§ 480–482.*

CHAPTER IX

OPERATION OF CONTRACT

188. Limits of Contractual Relation—In General.
189–190. Imposing Liability on Third Persons.
191–192. Conferring Rights on Third Persons.
193. Assignment of Contracts—In General.
194. Assignment of Liabilities by Act of Parties.
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203–204. Joint Contracts.
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207. Contracts both Joint and Several.
208. Contribution between Joint Debtors.

Thus far we have endeavored to show what is necessary to the formation and existence of a valid contract. Having ascertained this, we must next consider its effect when formed. In doing so we will first ascertain to whom the obligation of a contract extends, or who have rights or liabilities under it. Then we shall ascertain the extent to which the rights and liabilities may be assigned or pass to others than the original parties. After that we will consider the operation and effect of a contract having several parties on one or both sides.

LIMITS OF CONTRACTUAL RELATION—IN GENERAL

188. As a rule, a contract does not impose liabilities nor confer rights on a person who is not a party to it.

EXCEPTIONS—(a) There are apparent exceptions to this rule:

(1) Where one person represents another in entering into a contract; that is, in the case of contracts through agents.

(2) Where the rights or liabilities created by a contract pass to a person or persons other than the original parties by assignment.

(b) There are also real exceptions to the rule in some jurisdictions.

The rule that a person who is not a party to a contract cannot be included in the rights or liabilities which it creates, so as to entitle him to sue, or render him liable to be sued, upon it, flows from the very nature of contract as a legal conception. As we have seen, a true contract is an agreement between two or more persons, by which an obligation or legal tie is created, binding those persons together, so that one or each has the right to require some act or forbearance on the part of the other. As a rule, the legal relations of third persons are not affected, because they are not parties to the agreement. They are not bound by the legal bond which it creates, and a breach thereof cannot give them any rights. Nor, on the other hand, can any liabilities be imposed upon them.

It will be noticed that the rule stated in the black-letter text is divisible. There are in fact two rules—the first, that a contract cannot impose liabilities, and the second, that it cannot confer rights, on a person who is not a party to it.[1] We can better reach a correct understanding of the law on this subject if we consider each of these rules separately, together with the exceptions, or apparent exceptions, peculiar to it; but before doing so we must notice two apparent exceptions to the rule as a whole.

Apparent Exceptions to the Rule—Agency

Although one person cannot, as a rule, by contract with another, impose liabilities, nor confer rights, on a third person not a party to the contract, one person may represent another, as being employed by him, for the purpose of bringing him into contractual relations with a third. Employment for this purpose is called "agency," the employer being called the "principal" and the employed his "agent." The acts of the agent in making contracts are done on behalf, and generally, though not necessarily, in the name, of his principal. The principal really becomes a party to the contract made for him by his agent. A contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification by the principal, and this authority or ratification is nothing else than the assent of the principal to be bound. The contract which binds him is his own contract. After all, therefore, this is only an apparent exception to the rule that persons not parties to a contract are not bound or given rights thereby.

Same—Assignment of Contracts

If John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights upon John Styles. There are circumstances, however, under which John Doe or Richard Roe may

[1] Anson, Cont. (4th Ed.) 209.

substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution. John Styles thus becomes a party to the contract. This substitution is called assignment of the contract. Before discussing assignment we will take up in turn, and explain, each subdivision of the general rule mentioned in the black-letter text, and show the exceptions to which it is subject.

SAME—IMPOSING LIABILITY ON THIRD PERSONS

189. A contract cannot impose liabilities on a person who is not a party to it.

190. A contract, however, between master and servant at least, imposes a duty on third persons not to interfere maliciously with its performance by inducing the servant to break it, and for a violation of this duty an action will lie. Many courts hold that the doctrine applies to all contracts.

The proposition that a man cannot incur liabilities from a contract to which he was not a party is a part of a wider rule that liability ex contractu cannot be imposed upon a man otherwise than by his act or consent. "A man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor." [2] Two persons cannot, by any contract into which they may enter, thereby impose liabilities upon a third person.[3] Where a person, for instance, contracts with another to perform services for him, or to sell him goods, he may, under some circumstances, procure the services to be rendered or the goods delivered by a third person, and thus perform his contract; but he cannot, by any such agreement with a third person, confer upon the latter the right to require payment of the other party. Nor will the law create a contract between the latter and such third person because of the acceptance of the services or goods, where there was no intention to enter into legal relations with the third person.[4]

[2] Durnford v. Messiter, 5 Maule & S. 446; Hearn v. Cullin, 54 Md. 533. *See "Contracts," Dec. Dig. (Key-No.) § 186; Cent. Dig. §§ 790–797; "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 13.*

[3] Rossman v. Townsend, 17 Wis. 98, 84 Am. Dec. 733; Bolles v. Carli, 12 Minn. 113 (Gil. 62); Evansville & S. I. Traction Co. v. Evansville Belt Ry. Co., 44 Ind. App. 155, 87 N. E. 21. *See "Contracts," Dec. Dig. (Key-No.) § 177; Cent. Dig. §§ 771–774.*

[4] Schmaling v. Thomlinson, 6 Taunt. 147; BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9, Throckmorton Cas. Contracts, 305; School Dist.

Contract may Impose Duty on Third Parties

Though a contract cannot impose the burdens of an obligation upon one who was not a party to it, it may impose a duty upon persons extraneous to the obligation not to interfere maliciously with its due performance. In a leading English case, Lumley v. Gye,[5] where a person induced a singer to break her contract with the manager of an opera house, and was sued by the manager for maliciously procuring the breach, it was argued (1) that an action would lie against one who procured the breach of any kind of contract; and (2) that, if that were not so, an action would lie, at any rate, for inducing a servant to quit the service of his master. The relation of master and servant has always been held to involve a right on the part of the master to sue any one who enticed away his servant, and so the court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? If not, then does the exceptional rule applicable to the contract of master and servant apply to the manager of a theater and the actors whom he engages to perform? The majority of the court answered both questions in the affirmative, with the qualification that the inducement must be malicious. Later English cases have affirmed this decision, but upon the broad ground that it is an actionable wrong maliciously to induce another to break a contract.[6] If the interference is used for the purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, the conduct is malicious. The same doctrine has been held by many courts in this country.[7] On the other hand, some courts have held that the doctrine does not apply to other contracts than the contract be-

of Beatrice v. Thomas, 51 Neb. 740, 71 N. W. 731; post, p. 443. *See "Contracts," Dec. Dig. (Key-No.) § 177; Cent. Dig. §§ 771–774.*

[5] 2 El. & Bl. 216. *See "Contracts," Dec. Dig. (Key-No.) § 188; Cent. Dig. §§ 808–810.*

[6] Bowen v. Hall, 6 Q. B. Div. 339; Temperton v. Russell, [1893] 1 Q. B. 876. *See "Torts," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 13.*

[7] PERKINS v. PENDLETON, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252, Throckmorton Cas. Contracts, 308; Walker v. Cronin, 107 Mass. 555; Jones v. Stanly, 76 N. C. 355; Lucke v. Clothing Cutters, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Jones v. Blocker, 43 Ga. 331; Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Angle v. Railroad Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669; Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869. And see Ensor v. Bolgiano, 67 Md. 190, 9 Atl. 529; Dudley v. Briggs, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494; Burgess v. Carpenter, 2 S. C. 7, 16 Am. Rep. 643; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. *See "Torts," Dec. Dig. (Key-No.) § 12; Cent. Dig. § 13.*

tween master and servant.[8] As to this contract, there is probably no conflict at all.[9]

SAME—CONFERRING RIGHTS ON THIRD PERSONS

191. As a rule, a contract cannot confer rights on a person who is not a party to it.

192. EXCEPTIONS—(a) The rule is subject to apparent exceptions as follows:

(1) If the contract is such as to constitute the promisor trustee for the benefit of the third person, the latter may sue in equity.

(2) Where money or other property has come into the promisor's hands by virtue of the contract, for the use of the third person, the law creates a so-called contract between him and such third person, on which the latter may sue.

(b) In many of the states an exception is made in case of a promise made for the benefit of a third person, and the latter is allowed to sue thereon. It seems, however, that there must be such a relation between the promisee and the person for whose benefit the promise is made as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the former to the latter.[10]

[8] Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165; Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Bourlier v. Macauley, 91 Ky. 133, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; Glencoe Land & Gravel Co. v. Commission Co., 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560. All the courts probably agree, however, that an action will lie by a party to a contract against a third person for fraudulent representations by the latter, inducing the other party to the contract to break it. Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559. *See "Master and Servant," Dec. Dig. (Key-No.) § 339; Cent. Dig. § 1283.*

[9] Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Noice v. Brown, 39 N. J. Law, 569; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Woodward v. Washburn, 3 Denio (N. Y.) 369; Walker v. Cronin, 107 Mass. 555; Ames v. Railway Co., 117 Mass. 541, 19 Am. Rep. 426; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Jones v. Blocker, 43 Ga. 331; Daniel v. Swearengen, 6 S. C. 297, 24 Am. Rep. 471; Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680. *See "Master and Servant," Dec. Dig. (Key-No.) § 339; Cent. Dig. § 1283.*

[10] See article by Professor Samuel Williston on "Contracts for the Benefit of a Third Person," 15 Harv. L. R. 767.

This rule, in its general application, is recognized by all courts. It is settled, for instance, that where a bilateral contract is made, a third person cannot perform for one of the parties, and himself claim performance by the other. He cannot thus acquire rights under the contract, even by agreement with the party whose promise he performs, unless the contract, as will be presently explained, is assignable, and is assigned. This is, in effect, another way of looking at the rule which we have already considered—that a contract cannot impose liabilities on a person not a party to it.

In a leading English case, shippers had employed a firm of brokers to transport a quantity of cocoa for them, and the brokers got a third person to do it. It was held that the latter could not sue the shippers for his expenses and commission, inasmuch as there was no privity of contract between him and them. It was said that the brokers were employed by the shippers to do the whole work for them; that the shippers looked to the brokers for the performance of the work, and the brokers had a right to look to them for payment, and that no one else had that right.[11] This case illustrates both of the rules which we are considering. The contract between the brokers and the third person could not impose a liability on the shippers, as they were not parties to it; nor could the contract between the shippers and the brokers confer any rights upon the third person, since he was not a party to it.

Thus far the rule is clear and is not controverted.[12] A difficulty, and considerable difference of opinion, arises, however, where the contract consists of a promise expressly made by one of the parties for the benefit of a third person; as, where one of the parties, for a consideration moving from the other, promises him to pay money to, or perform services for, a stranger to the contract. There may be said to be three different doctrines on this point; and probably there are more. For convenience we will call them the English,[13]

[11] Schmaling v. Thomlinson, 6 Taunt. 147. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[12] Standard Oil Co. v. Murray, 119 Fed. 572, 57 C. C. A. 1. To the effect that a company which has contracted with a city to supply it with water for extinguishing fires is not liable for breach of the contract to a citizen whose property is destroyed because of such breach, see Becker v. Waterworks, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; Fitch v. Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; House v. Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Boston Safe-Deposit & Trust Co. v. Salem Water Co. (C. C.) 94 Fed. 238. Contra, Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536; Gorrell v. Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[13] Anson, Cont. (4th Ed.) 212 et seq.

the Massachusetts, and the New York doctrines, and will treat them separately.

Promise for Benefit of Third Person—The English Doctrine

If two persons should make a contract in which one promises to do something for a third person, all three might be willing that such third person should have all the rights of an actual contracting party, and should be allowed to sue on the promise. In England, however, it is established that the action cannot be maintained. If a person makes a promise to another, the consideration for which is a benefit to be conferred by the promisee on a third person, the contract confers no right on the third person to sue. In a leading English case the defendant had made a promise that, in consideration of the promisee's working for him, he would pay the plaintiff a sum of money, and it was held that the plaintiff could not recover on the promise. The members of the court stated in different forms the same reason for their decision. One said that the declaration did not "show any consideration for the promise moving from the plaintiff to defendant"; another, that "no privity is shown between the plaintiff and the defendant"; another, that it was "consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement" between the promisee and the defendant; and another, that there was "no promise to the plaintiff alleged." [14]

Same—Exceptions

It was at one time thought in England that, if the person who was to take a benefit under the contract was nearly related by blood to the promisee, a right of action would vest in him; [15] but such a doctrine, if it ever really existed, has been overruled. In a case in which the respective fathers of the parties to a marriage had entered into a contract between themselves only that each should pay a sum of money to the husband, and expressly stipulated that the latter should have power to sue therefor, it was held that an action by him would not lie. "Some of the old decisions," it was said, "appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it if he stands in such a near relationship to the party from whom the consideration proceeds that he may be considered

[14] Price v. Easton, 4 Barn. & Adol. 433. And see Tweddle v. Atkinson, 1 Best & S. 393. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[15] Dutton v. Poole, 2 Lev. 210; Bourne v. Mason, 1 Vent. 6. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

a party to the consideration. * * * It is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit." [16]

In courts of equity, language has been used, sometimes very explicit, to the effect that, where money is payable to one person for the benefit of another, the latter "can claim under the contract as if it had been with himself"; [17] but the later cases go to show that even in equity a person who was not a party to a contract cannot acquire rights thereunder and sue thereon.[18] The beneficiary of a contract acquires no rights ex contractu, even in equity. If the contract is so framed as to make one of the parties trustee for a third person for whose benefit it is made, such third person acquires rights by virtue of the trust. A mere contract, however, between two parties, that one of them shall pay money to a third, does not make that third person a cestui que trust. There must be some declaration of trust by one of the contracting parties in favor of the third person.[19]

Same—Massachusetts Doctrine

The English doctrine on this subject is also recognized by the Massachusetts court, and by the courts of some of the other states.[20] "The general rule of law," it was said by the Massa-

[16] Tweddle v. Atkinson, 1 Best & S. 393. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[17] Touche v. Warehousing Co., 6 Ch. App. 671; Spiller v. Skating Rink, 7 Ch. Div. 368. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[18] Eley v. Assurance Co., 1 Exch. Div. (Ct. App.) 88; In re Empress Eng. Co., 16 Ch. Div. 125. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[19] Two English cases, decided about the same time, are cited by Anson as illustrating this distinction. In one it was held that a clause in a contract of partnership which provided for the payment of an annuity, for five years after the determination of the partnership, to the retiring partner or his widow, created a trust in favor of the widow. Murray v. Flavell, 25 Ch. Div. 89. On the other hand, where a person had employed the plaintiff in the formation of the defendant company, and afterwards agreed with the company that it should pay the plaintiff for his services, it was held that the agreement gave no right of action to the plaintiff. In re Rotheram Alum Co., 25 Ch. Div. 104. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. Cent. Dig. §§ 798–807.*

[20] Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Rogers v. Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Wheeler v. Stewart, 94 Mich. 445, 54 N. W. 172; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; Edwards v. Clement, 81 Mich. 513, 45 N. W. 1107; Pipp v. Reynolds, 20 Mich. 88; Woodland v. Newhall's Adm'r (C. C.) 31 Fed. 434; Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184; Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497; Baxter v. Camp, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514,

chusetts court, "is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract; and, consequently, that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter." [21]

Same—Exceptions to the Massachusetts Doctrine

There is no doubt that in this country courts of equity recognize the apparent exception to this rule, already mentioned in the case of trusts; and that where a contract, consisting of a promise for the benefit of a third person, is so framed as to make the promisor a trustee for such third person, the latter may sue to enforce the trust.[22]

In addition to this, there is another apparent exception. This exception is in cases where, under a contract in which a promise is made for the benefit of a third person, assets come to the promisor's hands, or under his control, which in equity belong to the third person; or, as it has been expressed, "those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors." [23] In such cases the

71 Am. St. Rep. 169; Morgan v. Randolph & Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653; Knights of the Modern Maccabees v. Sharp, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780. And see Sheppard v. Bridges, 137 Ga. 615, 74 S. E. 245. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[21] Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1; BORDEN v. BOARDMAN, 157 Mass. 410, 32 N. E. 469, Throckmorton Cas. Contracts, 314. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[22] Union Pac. R. Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Chace v. Chapin, 130 Mass. 128; Preachers' Aid Soc. v. England, 106 Ill. 125; Mory v. Michael, 18 Md. 227; Harrisburg Bank v. Tyler, 3 Watts & S. (Pa.) 373. And see Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807; "Trusts," Dec. Dig. (Key-No.) § 35; Cent. Dig. §§ 45–50.*

[23] Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Howes v. Scott, 224 Pa. 7, 73 Atl. 186; Barry v. Jordan, 116 Minn. 34, 133 N. W. 78. The exceptions to the rule that a stranger to a contract cannot maintain an action on it were stated by the supreme court of the United States in language frequently referred to by that court with approval, as follows: "There are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets

third person may sue the promisor in his own name. The rights of the third person are not conferred upon him by the contract between the promisor and promisee, but arise out of a contract created by law, or quasi contract, between the promisor and the third person.[24]

The exception formerly recognized in England, but since overruled there, to the effect that, if a third person for whose benefit a contract is made is nearly related by blood to the promisee, a right of action on the promise vests in him, has been recognized in this country,[25] but some of the courts have refused to recognize

have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and, if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now." Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75. See, also, Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613. The question whether the remedy of the mortgagee against a grantor who has assumed the mortgage is in law in his own right, or in equity and in the right of the mortgagor only, is to be determined by the law of the place where the suit is brought. Willard v. Wood, supra; Union Mut. Life Ins. Co. v. Hanford, supra; Johns v. Wilson, supra. See, also, Adams v. Shirk, 105 Fed. 659, 44 C. C. A. 653. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[24] Carnegie v. Morrison, 2 Metc. (Mass.) 381; Putnam v. Field, 103 Mass. 556; Spencer v. Towles, 18 Mich. 9; Grim v. Iron Co., 115 Pa. 611, 8 Atl. 595; Hosford v. Kanouse, 45 Mich. 620, 8 N. W. 567; Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75; Hostetter v. Hollinger, 117 Pa. 606, 12 Atl. 741; O'Neal v. Board, 27 Md. 227; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Lewis v. Sawyer, 44 Me. 332; Keene v. Sage, 75 Me. 138; Taylor v. Taylor, 20 Ill. 650. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[25] Felton v. Dickinson, 10 Mass. 287; Benge v. Hiatt's Adm'r, 82 Ky. 666, 56 Am. Rep. 912. See, also, Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454; Everdell v. Hill, 27 Misc. Rep. 285, 58 N. Y. Supp. 447. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

it.[26] Even in Massachusetts, where it has been directly held, the court has since expressed a doubt on the question, even if it has not expressly held the contrary.[27]

Same—The New York Doctrine

In New York, and in most of the other states, the courts have refused to recognize the doctrine that a person for whose benefit a promise is made cannot sue the promisor unless he was a party to the contract. In a leading New York case a debtor of the plaintiff had loaned money to the defendant, and the defendant had promised him to pay the plaintiff. The plaintiff was not a party to the contract, but it was held by four of the seven judges that he could sue on the promise, as it was considered settled in that state that, where a promise is "made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach." [28] In many cases the rule has been declared broadly as thus stated.[29]

[26] Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[27] Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Marston v. Bigelow, 150 Mass. 53, 22 N. E. 71, 5 L. R. A. 43. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[28] LAWRENCE v. FOX, 20 N. Y. 268, Throckmorton Cas. Contracts, 315. See, also, Schermerhorn v. Vanderheyden, 1 Johns. 140, 3 Am. Dec. 304; Todd v. Weber, 95 N. Y. 181, 47 Am. Rep. 20; Stewart v. Trustees, 2 Denio (N. Y.) 403; Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[29] Bassett v. Hughes, 43 Wis. 319; Bristow v. Lane, 21 Ill. 194; Bay v. Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Mason v. Hall, 30 Ala. 599; Brice v. King, 1 Head (Tenn.) 152; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Small v. Schaefer, 24 Md. 143; Bohanan v. Pope, 42 Me. 93; Coleman v. Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517; Kaufman v. Bank, 31 Neb. 661, 48 N. W. 738; Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Flint v. Cadenasso, 64 Cal. 83, 28 Pac. 62; Hecht v. Caughron, 46 Ark. 135; Jones v. Thomas, 21 Grat. (Va.) 96; Robbins v. Ayres, 10 Mo. 538, 47 Am. Dec. 125; Whitehead v. Burgess, 61 N. J. Law, 75, 38 Atl. 802; Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 88; Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Ingram v. Ingram, 172 Ill. 287, 50 N. E. 198; Rohman v. Gaiser, 53 Neb. 474, 73 N. W. 923; Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; Gorrell v. Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; Ferris v. Brewing Co., 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; Elmer v. Loper, 66 N. J. Law, 50, 48 Atl. 550. Cf. Electric Appliance Co. v. Guaranty Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. That the person for whose benefit a promise is made may sue does not prevent the promisee from also suing. Steene v. Aylesworth, 18 Conn. 244; Merriam v. Lumber Co., 23 Minn. 314. But see Seigman v. Hoffacker, 57 Md. 321. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

According to the decisions in New York and many other states, however, there must be something more than a mere promise for the benefit of the third person. The promise must be for his benefit,[80] and there must be between the promisee and the third person seeking to enforce the promise the relation of debtor and creditor, or some such relation as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the promisee to such third person.[81] "It is not sufficient that the performance of the promise may benefit the third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties; and, in addition, the promisee must have a legal interest that the promise be performed in favor of the party claiming performance."[82]

Thus, where a mortgagor conveys the mortgaged premises to a purchaser, who in his deed assumes and agrees to pay the mort-

[80] Simson v. Brown, 68 N. Y. 355; Wheat v. Rice, 97 N. Y. 296; Austin v. Seligman (C. C.) 18 Fed. 519; Sayward v. Dexter, Horton & Co., 72 Fed. 758, 19 C. C. A. 176; American Exch. Nat. Bank v. Railroad Co. (C. C.) 76 Fed. 130; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478; Wright v. Terry, 23 Fla. 160, 2 South. 6; Burton v. Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Crandall v. Payne, 154 Ill. 627, 39 N. E. 601; Walsh v. Featherstone, 67 Minn. 103, 69 N. W. 811; School Dist. of Beatrice v. Thomas, 51 Neb. 740, 71 N. W. 731; German State Bank v. Light Co., 104 Iowa, 717, 74 N. W. 685; Washburn v. Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620; Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. 899; Thomas Mfg. Co. v. Prather, 65 Ark. 27, 44 S. W. 218; Rowe v. Moon, 115 Wis. 566, 92 N. W. 263. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[81] Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Wheat v. Rice, 97 N. Y. 302; Lorillard v. Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731 (but see Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454); Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; Union Railway Storage Co. v. McDermott, 53 Minn. 407, 55 N. W. 606; Thomas Mfg. Co. v. Prather, 65 Ark. 27, 44 S. W. 218. And see Coleman v. Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517; Lovejoy v. Howe, 55 Minn. 653, 57 N. W. 57; Barnes v. Insurance Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; Montgomery v. Rief, 15 Utah, 495, 50 Pac. 623; German State Bank v. Light Co., 104 Iowa, 717, 74 N. W. 685; Feldman v. McGuire, 34 Or. 309, 55 Pac. 872; Street v. Goodale, 77 Mo. App. 318; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005; Merchants' Union Trust Co. v. New Philadelphia Graphite Co. (Del. Ch.) 83 Atl. 520; Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44, 117 S. W. 611. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[82] Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

gage, it is generally held that the mortgagee may maintain an action against the grantee upon the covenant to pay;[83] but if the grantor is not personally bound to pay a mortgage upon the granted premises, as where he has purchased subject to the mortgage without assuming it, his grantee does not by assuming the mortgage become personally liable to the mortgagee.[84] It is very generally held that the promisee can release the promisor from his obligation before the third person for whose benefit the promise was made has assented to and adopted it,[85] but not afterwards.[86]

[83] Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Bay v. Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Flint v. Cadenasso, 64 Cal. 83, 28 Pac. 62; Stephenson v. Elliott, 53 Kan. 550, 36 Pac. 980; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Webster v. Fleming, 178 Ill. 140. 52 N. E. 975; Kehoe v. Patton, 23 R. I. 360, 50 Atl. 655. See note 36, infra. *See "Mortgages," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 740–755.*

[84] Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526; Young Men's Christian Ass'n of Portland v. Croft, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568; Eakin v. Shultz, 61 N. J. Eq. 156, 47 Atl. 274. Contra, Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 38. *See "Mortgages," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 740–755.*

[85] Kelly v. Roberts, 40 N. Y. 432; Brewer v. Mauerer, 38 Ohio St. 543, 43 Am. Rep. 436; Gilbert v. Sanderson, 56 Iowa, 349, 9 N. W. 293, 41 Am. Rep. 103; Comley v. Dazian, 114 N. Y. 161, 21 N. E. 135. *See "Mortgages," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 740–755.*

[86] Bassett v. Hughes, 43 Wis. 319; Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732; Dodge's Adm'r v. Moss, 82 Ky. 441; Etscheid v. Baker, 112 Wis. 129, 88 N. W. 52. And see Clark v. Fisk, 9 Utah, 94, 33 Pac. 248. But some courts hold that the promise invests the third person with an immediate right, which the promisee cannot release. Bay v. Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 309, 96 Am. St. Rep. 1003. In states which do not recognize the right of a third person for whose benefit the promise is made to enforce the contract, he may sometimes avail himself of the promise in equity by subrogation to the rights of the promisee, as in the case of a mortgagee where a grantee of a mortgagor has assumed the mortgage. Such is the rule in the federal courts. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Knapp v. Insurance Co., 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861. Here the rights of the mortgagee against the grantee are necessarily defeated if the grantor releases the grantee from his covenant, unless the release is in fraud of creditors. See Jones, Mtg. § 763; Crowell v. Hospital, 27 N. J. Eq. 650; Youngs v. Public Schools, 31 N. J. Eq. 290; O'Neill v. Clark, 33 N. J. Eq. 444. *See "Mortgages," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 740–755.*

Same—Contracts under Seal

In some of the states it is held that the doctrine allowing suit on a contract by a third person for whose benefit it is made applies as well to covenants or promises under seal as to simple contracts.[37] In other states the contrary has been held, on the ground that assumpsit will not lie on a covenant under seal, and that it is only an action of assumpsit that will lie by a person for whose benefit a promise has been made to another.[38]

Same—Statutory Exceptions

In several states it is expressly provided by statute that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."[39] And similar provisions giving the beneficiary a right to sue upon a contract made for his benefit exist in other states.[40]

By statute, in many of the states—no doubt in all the code states—it is expressly provided that every action must be prosecuted in the name of the real party in interest, except in certain cases; and under such a provision it has been held that the person for whose benefit a contract is made may sue thereon.[41]

[37] Bassett v. Hughes, 43 Wis. 319. And see Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; Coster v. City of Albany, 43 N. Y. 399; Riordan v. Presbyterian Church, 6 Misc. Rep. 84, 26 N. Y. Supp. 38; Kimball v. Noyes, 17 Wis. 695; McDowell v. Laev, 33 Wis. 171; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975. Cf. Harms v. McCormick, 132 Ill. 104, 22 N. E. 511. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[38] Hinkley v. Fowler, 15 Me. 285. And see Cocks v. Varney, 45 N. J. Eq. 72, 17 Atl. 108; Seigman v. Hoffacker, 57 Md. 321; Robbins v. Ayres, 10 Mo. 538, 47 Am. Dec. 125; Baldwin v. Emery, 89 Me. 496, 36 Atl. 994. Cf. Styles v. F. R. Long Co., 67 N. J. Law, 413, 51 Atl. 710. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[39] Civ. Code Cal. § 1559; Civ. Code N. D. § 4688. And see 15 Harv. L. Rev. 778; Eastman Land & Investment Co. v. Long-Bell Lumber Co., 30 Okl. 555, 120 Pa. 276. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[40] Civ. Code La. art. 1890, Code Prac. La. art. 35; Code W. Va. c. 71, § 2; Edwards v. National Window Glass Jobbers' Ass'n (N. J. Sup.) 68 Atl. 800. And see City of Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 798–807.*

[41] Bliss, Code Pl. § 241; Pomeroy, Rem. & Rem. R. § 139. See Paducah Lumber Co. v. Water Supply Co., 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; Stevens v. Flannagan, 131 Ind. 122, 30 N. E. 898; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Faust v. Faust, 144 N. C. 383, 57 S. E. 22. But it seems that a third person must establish a legal, or at least an equitable, right to enforce the contract independently of this provision. Ante, p. ——, and cases cited in note ——; Anson, Contr. (8th Ed.) 282, note by Prof. Huffcut. "The difficult question is whether the third person is the real party in interest." Professor Wil-

Action by Third Party for Many Joint Contractors

If a person and a group of persons, such as an unincorporated society should enter into a contract, it might be convenient that a third person should be able to sue on behalf of the group. The general rule, however, that a contract cannot confer rights on persons not parties to it, applies. In a case in which the managers of an association, under powers of attorney executed by the members, sued upon a contract entered into by the association, it was held that they could not maintain the action, "for the simple reason * * * that the proper person to bring an action is the person whose right has been violated." "This is an attempt," it was further said, "to do what has been frequently, but fruitlessly, attempted before, viz., to get rid of the difficulty of a large number of people suing in their own names—to appoint a public officer without obtaining an act of parliament or a charter of incorporation."[42]

In some of the states, statutes have been enacted expressly providing that where the parties are very numerous, and it would be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.[43]

ASSIGNMENT OF CONTRACTS—IN GENERAL

193. Under some circumstances, a person not a party to a contract may take the place of one of the parties. This substitution is called assignment of the contract. It may be either

(a) By the voluntary act of the parties, or

(b) By operation of law.

We have just seen that, subject to certain exceptions, a contract cannot affect any but the parties to it, either by imposing liabilities or conferring rights on them. The original parties to a contract, however, may, under certain circumstances, drop out, and others may take their places. The operation by which this change in the contractual relation is effected is termed an assignment of the contract.

liston in 15 Harv. L. Rev. 778. *See "Parties," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 6, 7; "Contracts," Cent. Dig. § 1597.*

[42] Gray v. Pearson, L. R. 5 C. P. 568. See Anson, Cont. (8th Ed.) 230. *See "Parties," Dec. Dig. (Key-No.) §§ 10–12; Cent. Dig. § 12.*

[43] Thames v. Jones, 97 N. C. 121, 1 S. E. 692; Gibson v. Trust Co., 58 Hun, 443, 12 N. Y. Supp. 444; Gieske v. Anderson, 77 Cal. 247, 19 Pac. 421; Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735; Alexander v. Gish, 88 Ky. 13, 9 S. W. 801; Lilly v. Tobbein (Mo. Sup.) 13 S. W. 1060. *See "Parties," Dec. Dig. (Key-No.) §§ 10–12; Cent. Dig. § 12.*

SAME—ASSIGNMENT OF LIABILITIES BY ACT OF PARTIES

194. A person cannot assign his liabilities under a contract.

APPARENT EXCEPTIONS—(a) He may so assign with the consent of the other party to the contract.

(b) In contracts to do work involving no personal skill or personal qualifications, the party may have the work done by another, but he remains liable if it is not properly done.

(c) When an interest in land is transferred, certain liabilities attaching to the enjoyment of the interest pass with it.

A person cannot assign his liabilities under a contract, or, to put the matter from the point of view of the other party to the contract, a person cannot be compelled to accept performance of the contract from a person who was not originally a party to it. The reason for the rule lies not only in the right of a person to know to whom he is to look for the satisfaction of his rights under a contract, but in his right "to the benefit which he contemplates from the character, credit, and substance of the person with whom he contracts." [44]

The rule is well illustrated by a case in which one Sharpe let a carriage to the defendant, at a yearly rent, for five years, undertaking to paint it every year and keep it in repair. One Robson was, in fact, the partner of Sharpe, but the defendant contracted with Sharpe alone. After three years, Sharpe retired from business, and the defendant was informed that Robson was thenceforth answerable for the repair of the carriage and would receive the rent. The defendant refused to accept the substitution, and it was held that he could not be sued upon the contract. "The defendant," it was said, "may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. * * * The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being

[44] Humble v. Hunter, 12 Q. B. 310. And see ARKANSAS VAL. SMELTING CO. v. BELDEN MIN. CO., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, Throckmorton Cas. Contracts, 320; Chapin v. Longworth, 31 Ohio St. 421; Rappleye v. Seeder Co., 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; Burger v. Rice, 3 Ind. 125; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Griswold v. Railroad Co., 18 Mo. App. 52; Lansden v. McCarthy, 45 Mo. 106; Palo Pinto Co. v. Gano, 60 Tex. 249; Donelson v. Polk, 64 Md. 501, 2 Atl. 824; Stewart v. Railroad Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Sprankle v. Trulove, 22 Ind. App. 577, 54 N. E. 461; post, p. 458, and cases there cited. *See "Assignment," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person." [45]

Exceptions to the Rule

The exceptions to this rule are apparent rather than real. A person may assign the liabilities imposed upon him by a contract which he has made if the other party to the contract consents. This, however, is, in effect, a new contract. It is a rescission by agreement of the old contract, and the substitution of a new one, in which the same acts are to be performed by different parties.

Another apparent exception is in this, namely, that if a person undertakes to do work for another which requires no special skill, and he has not been selected for the work with reference to any personal qualifications, he may have the work done by some equally competent third person. This, however, is not an assignment of his liabilities, for he does not cease to be liable if the work is not done in accordance with the contract.[46]

The third apparent exception is where an interest in land is transferred. In such case, liabilities attaching to the enjoyment of the interest pass with it. This will be discussed presently.

SAME—ASSIGNMENT OF RIGHTS BY ACT OF PARTIES

195. AT COMMON LAW. Rights arising out of a contract cannot be assigned at common law except—

EXCEPTIONS—(a) By an agreement between the original parties and the intended assignee, which is subject to all the rules for the formation of a valid contract.

(b) By the rules of the law merchant in the case of negotiable instruments.

[45] Robson v. Drummond, 2 Barn. & Adol. 303. BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9, Throckmorton Cas. Contracts, 305. Cf. British Waggon Co. v. Lea, 5 Q. B. Div. 149. And see Hand v. Evans Marble Co., 88 Md. 226, 40 Atl. 899; Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, in the latter which it is said, per Hoke, J., in reference to Robson v. Drummond and BOSTON ICE CO. v. POTTER, supra: "Certainly, neither one of these cases can, it seems to us, be supported except on the theory that there were terms in the contract importing reliance on the personal skill, business standing or methods of the other contracting party." See, also, to the same effect, article by Prof. F. C. Woodward in 18 Harv. L. Rev. 23. *See "Assignments," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

[46] British Waggon Co. v. Lea, 5 Q. B. Div. 149; Rochester Lantern Co. v. Press Co., 135 N. Y. 209, 31 N. E. 1018. *See "Assignments," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

(c) An assignment in equity is so far recognized at common law as to permit the assignee to sue thereon in the name of the assignor or his representatives.

196. IN EQUITY. A chose in action, or rights under a contract, may be assigned in equity whenever the contract is not for exclusively personal services, and does not involve personal credit, trust, and confidence. But—

CONDITIONS—(a) Notice is necessary to bind the debtor or person liable.

(b) The assignee takes subject to all such defenses as would have prevailed against the assignor.

197. BY STATUTE. There are statutes in most states allowing the assignment of choses in action, and a suit at law by the assignee in his own name.

At Common Law

At common law, apart from the customs of the law merchant, the rights or benefits arising out of a contract, or, as it is generally termed, a chose in action, cannot be assigned so as to entitle the assignee to sue upon it in his own name.[47] This is a settled and inflexible rule, and its effect cannot be avoided by stipulations of the parties, as by an express provision in the contract to the effect that it may be assigned, provided, of course, the stipulation does not render the contract a negotiable instrument, and so bring it within the law merchant.[48]

As will be seen, however, the assignment creates rights in equity, and the common law so far takes cognizance of these equitable rights as to permit the assignee to use the name of the assignor, or his representative if the assignor be dead, as trustee for the assignee, so that he may sue on the contract in their name. An equitable assignment of a chose in action is in the nature of a declara-

[47] Leake, Cont. 601; Co. Litt. 214a, 232b; 2 Bl. Comm. 442; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Hay v. Green, 12 Cush. (Mass.) 282; Hunt v. Mann, 132 Mass. 53; Glenn v. Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790. "The origin of the rule was attributed by Coke to the 'wisdom and policy of the founders of our law' in discouraging maintenance and litigation; but there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor." Pol. Cont. 206. *See "Assignments," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 40, 41.*

[48] COOLIDGE v. RUGGLES, 15 Mass. 387, Throckmorton Cas. Contracts, 324; Weidler v. Kauffman, 14 Ohio, 455; Legro v. Staples, 16 Me. 252; Little v. Bank, 2 Hill (N. Y.) 425; Id., 7 Hill (N. Y.) 359; People v. Gray, 23 Cal. 125. *See "Assignments," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 35–41.*

tion of trust by the party having the legal right, and an agreement on his part to permit the assignee to make use of his name to enforce it.[49]

Strictly speaking, the only mode by which the rights under a contract can be really transferred at law is, not by assignment at all, but by means of a substituted agreement. If A. owes B. $100, and B. owes C. $100, it may be agreed between all three that A. shall pay C. instead of paying B., so that B. thereby terminates his legal relations with both parties. In such case the consideration for A.'s promise is the discharge of B.; the consideration for B.'s discharge of A. is the extinguishment of his debt to C.; the consideration for C.'s promise is the substitution of A.'s liability for that of B. This is known as a "novation." [50] To effect such a change of relations, there must be ascertained sums due from A. to B., and from B. to C.; and it is further essential that there shall be a definite agreement between the parties, for it is the promise of each which is the consideration for the promise of the others. It would not be enough for A. to say to C., "I will pay you instead of B.," and to afterwards suggest the arrangement to B., and receive his assent.[51] Nor would it be enough for B. to authorize A. in writing to pay to C., and for A. to acknowledge the paper in writing.[52] In neither of these cases would there be such an agreement between all three persons as to amount to a discharge by B. of the debt due by him to A. There would, therefore, be no consideration for A.'s promise to pay C., so as to support an action by C. against him. In an action under the circumstances of the second case mentioned above by C. against A. it was said: "There are two legal principles which, so far as I know, have never been departed from. One is that, at common law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and, that being the law, it is perfectly clear that B. could not assign to the plaintiff the debt due from the defendant to him. * * * The other principle which would be infringed by allowing

[49] Leake, Cont. 602; Welch v. Mandeville, 1 Wheat. 233, 4 L. Ed. 79; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31; Frear v. Evertson, 20 Johns. (N. Y.) 142; Parsons v. Woodward, 22 N. J. Law, 196; McWilliams v. Webb, 32 Iowa, 577; Webb v. Steele, 13 N. H. 230. *See "Assignments," Dec. Dig. (Key-No.) § 48; Cent. Dig. §§ 85–111.*

[50] Post, p. 528.

[51] Cuxon v. Chadley, 3 Barn. & C. 591. *See "Contracts," Dec. Dig. (Key-No.) § 240; Cent. Dig. § 1125.*

[52] Liversidge v. Broadbent, 4 Hurl. & N. 603. *See "Contracts," Dec. Dig. (Key-No.) § 240; Cent. Dig. § 1125.*

this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action." [53]

Same—Recognition of Equitable Assignment in Law

Courts of common law recognize the validity of equitable assignments for other purposes than to permit the assignee to sue at law in the name of the assignor. An assignment of a chose in action has always been held a good consideration for a promise.[54] Thus, the benefit of a contract may be sold, and the assignment of the contract forms a valuable consideration for a promise to pay the price, which may be recovered in an action at law.[55] The forbearance by the assignee of a debt to sue the debtor is a good consideration for an express promise by the debtor to pay the assignee, and on this promise the assignee may maintain an action in his own name.[56] He must sue on the debtor's promise to him, and not on the promise to the assignor assigned to him.

Rule in Equity

Equity permits the assignment of certain contracts subject to certain conditions. As a rule, however, the assignee of a chose in action must seek his remedy at law, by an action in the name of his assignor, and cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of his demand.[57] "A court of equity will not entertain a bill by the assignee of a strictly legal right, merely because he cannot bring an action at law in his own name, nor unless it appears that the assignor prevents and prohibits such an action from being brought in his name, or that an action so brought would not afford an adequate remedy at law." [58]

[53] Liversidge v. Broadbent, 4 Hurl. & N. 603. *See "Contracts," Dec. Dig. (Key-No.) § 240; Cent. Dig. § 1125.*

[54] Leake, Cont. 605; Master v. Miller, 4 Term R. 341; Skinner v. Somes, 14 Mass. 107. *See "Assignments," Dec. Dig. (Key-No.) §§ 48–52; Cent. Dig. §§ 88–111, 133.*

[55] Price v. Seaman, 4 Barn. & C. 525. *See "Assignments," Dec. Dig. (Key-No.) §§ 48–52; Cent. Dig. §§ 88–111, 133.*

[56] Morton v. Burn, 7 Adol. & E. 19; Fenner v. Mears, 2 W. Bl. 1269; Skinner v. Somes, 14 Mass. 107; Crocker v. Whitney, 10 Mass. 316; Jessel v. Insurance Co., 3 Hill (N. Y.) 88; Compton v. Jones, 4 Cow. (N. Y.) 13; Onion v. Paul, 1 Har. & J. (Md.) 114. *See "Assignments," Dec. Dig. (Key-No.) §§ 48–52; Cent. Dig. §§ 88–111, 133.*

[57] CARTER v. INSURANCE CO., 1 Johns. Ch. (N. Y.) 463, Throckmorton Cas. Contracts, 326; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; New York Guaranty & Indemnity Co. v. Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; Adair v. Winchester, 7 Gill & J. (Md.) 114; Smiley v. Bell, Mart. & Y. (Tenn.) 378, 17 Am. Dec. 813; Moseley v. Boush, 4 Rand. (Va.) 392. *See "Assignments," Dec. Dig. (Key-No.) § 120; Cent. Dig. §§ 206–209; "Contracts," Cent. Dig. § 1595.*

[58] Walker v. Brooks, 125 Mass. 241. See Smith v. Bates Machine Co., 182

When, however, a suit in equity is maintainable, it may be maintained by the assignee in his own name.

As we shall presently see, there are statutes in most of the states authorizing the assignment of choses in action, so as to give the assignee a right to sue at law in his own name. Where the statute is general, or does not provide otherwise, it is held that it allows such assignments at law as were formerly allowed in equity, and leaves them subject at law to the same rules as governed them in equity. What we shall now say, therefore, in regard to assignments in equity, will generally apply to assignments at law authorized by these statutes.

Same—What is Assignable

It may be said generally that anything which directly or indirectly involves a right of property is assignable,[59] with the exception that rights when coupled with liabilities under an executory contract for personal services, or under contracts otherwise involving personal credit, trust, or confidence cannot be assigned.[60] Such

Ill. 166, 55 N. E. 69. *See "Equity," Dec. Dig. (Key-No.) § 46; Cent. Dig. §§ 151–163.*

[59] Mulhall v. Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758; Grant v. Ludlow, 8 Ohio St. 1; Burkett v. Moses, 11 Rich. (S. C.) 432; Louisville R. Co. v. Goodbar, 88 Ind. 213; La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42, 45, 18 Am. St. Rep. 179; Francisco v. Smith, 143 N. Y. 488, 38 N. E. 980; Up River Ice Co. v. Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Fleckenstein Bros. Co. v. Fleckenstein (N. J. Ch.) 53 Atl. 1043; Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363 (quoting with approval the statement of the text from Clark on Contracts [2d Ed.] p. 364, and containing full discussion); Liberty Wall-Paper Co. v. Stoner Wall-Paper Mfg. Co., 59 App. Div. 353, 69 N. Y. Supp. 355 [affirmed 170 N. Y. 582, 63 N. E. 1119]. *See "Assignments," Dec. Dig. (Key-No.) §§ 18–19; Cent. Dig. §§ 25–31.*

[60] Robson v. Drummond, 2 Barn. & Adol. 303; British Waggon Co. v. Lea, 5 Q. B. Div. 149; Jaeger's Sanitary Woolen Supply Co. v. Walker, 77 L. T. (N. S.) 180; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Rappleye v. Seeder Co., 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; Joslyn v. Parlin, 54 Vt. 670; Chapin v. Longworth, 31 Ohio St. 421; Devlin v. City of New York, 63 N. Y. 8; Hardy Implement Co. v. South Bend Iron Works, 129 Mo. 222, 31 S. W. 599; Edison v. Balka, 111 Mich. 235, 69 N. W. 499; Eastern Advertising Co. v. McGow, 89 Md. 72, 42 Atl. 923; Zetterlund v. Texas Land & Coal Co., 55 Neb. 355, 75 N. W. 860; Campbell v. Board of Com'rs, 64 Kan. 376, 67 Pac. 806; Schlessinger v. Forest Products Co., 78 N. J. Law, 637, 76 Atl. 1024, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627. A contract by a publisher with an author to publish a work has been held not assignable by the publisher without the author's consent, because of the personal trust placed in the publisher by the author. Stevens v. Benning, 1 Kay & J. 168; Gibson v. Carruthers, 8 Mees. & W. 321, at page 343. And see Griffith v. Tower Pub. Co. [1897] 1 Ch. 21. A con-

things pass to the personal representatives of the party liable or entitled, and, as we shall see, are thus assigned by operation of law; and it has been said that "the power to assign and to transmit to personal representatives are convertible propositions."[61] A person who has made a contract to render personal services cannot assign his right to render such services, but he can assign his right to receive pay for them when rendered by him;[62] and so, it seems, a man can assign the money to become due under any contract.[63]

tract for the sale of goods on credit cannot be assigned by the vendee without the vendor's consent. ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, Throckmorton Cas. Contracts, 320. "When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised, and the obligations performed, by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract." Board of Com'rs of Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674, per Gray, J. And see Burck v. Taylor, 152 U. S. 634, 12 Sup. Ct. 696, 38 L. Ed. 578. A building or construction contract is not assignable where it is made in reliance on the personal skill or experience of the contractor. Johnson v. Vickers, 139 Wis. 145, 120 N. W. 837, 21 L. R. A. (N. S.) 359, 131 Am. St. Rep. 1046; but if not so made, is assignable, Taylor v. Palmer, 31 Cal. 240. If the contract prohibits assignment, an assignee succeeds to no rights. Mueller v. Northwestern University, 195 Ill. 263, 63 N. E. 110, 88 Am. St. Rep. 194; De Vita v. Loprete, 77 N. J. Eq. 533, 77 Atl. 536, Ann. Cas. 1912A, 362, and note. *See "Assignments," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

[61] Zabriskie v. Smith, 13 N. Y. 333, 64 Am. Dec. 551; Byxbie v. Wood, 24 N. Y. 607; Devlin v. City of New York, 63 N. Y. 8; Edmunds v. Illinois Cent. Ry. (C. C.) 80 Fed. 78. But see dictum in ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, Throckmorton Cas. Contracts, 320. *See "Assignments," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

[62] Rodijkeit v. Andrews, 74 Ohio St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564, 6 Ann. Cas. 761; Leitch v. Northern Pac. R. Co., 95 Minn. 35, 103 N. W. 704, 5 Ann. Cas. 63; Chicago, B. & I. R. Co. v. Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587. By statute in some states assignments of future wages are either absolutely void, or are void unless accepted by the employer and recorded. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. (N. S.) 746, 128 Am. St. Rep. 446. One not under contract or existing employment cannot, at law, make a valid assignment of wages he may earn in the future. It is the mere possibility of a subsequent acquisition of property, which is too uncertain to be the basis of assignment. Mulhall v. Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414; Hamilton v. Rogers, 8 Md. 301; Lehigh Valley R. Co. v. Woodring, 116 Pa. 518, 9 Atl. 58; O'Keefe v. Allen, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884. For assignment of salary by a public officer, see ante, p. 354. *See "Assignments," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

[63] Devlin v. City of New York, 63 N. Y. 8; Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220; Weed v. Jewett, 2 Metc. (Mass.) 608, 37 Am. Dec. 115; Brackett

Same—Partial Assignment

A debtor has a right to pay his debt as a whole, and cannot without his consent be subjected to separate actions by different persons. A creditor, therefore, cannot, at law, assign a part of his claim without the debtor's consent.[64] It is generally held, however, that the rule only applies where the assignment is sought to be enforced at law in the name of the assignor, and that in equity a partial assignment is good, for the reason that in equity the assignor, as well as the debtor, may be joined, and the whole controversy may be determined in one suit.[65]

v. Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; Emery v. Lawrence, 8 Cush. (Mass.) 151; Garland v. Harrington, 51 N. H. 409; Shaffer v. Mining Co., 55 Md. 74; Hawley v. Bristol, 39 Conn. 26; Greene v. Bartholomew, 34 Ind. 235; Metcalf v. Kincaid, 87 Iowa, 443, 54 N. W. 867, 43 Am. St. Rep. 391; Bates v. Lumber Co., 56 Minn. 14, 57 N. W. 218; Galey v. Mellon, 172 Pa. 443, 33 Atl. 560; Rodgers v. Torrent, 111 Mich. 680, 70 N. W. 335. A thing to be assignable, at law, must have at least a potential existence. Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Hassie v. Congregation, 35 Cal. 378; Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85. A man could not assign money to become due under a policy not yet issued, but, after issuance, he may do so before any loss. Bergson v. Insurance Co., 38 Cal. 541. Future rent under an existing lease. Demarest v. Willard, 8 Cow. (N. Y.) 206. A contract between an insurance company and its agent, by which the latter is entitled to receive commissions on renewal premiums, to accrue annually for a given period in the future, is assignable by the agent, as the contract is not dependent upon any contingency, though the profits arising under it are. Knevals v. Blauvelt, 82 Me. 458, 19 Atl. 818. But equity will uphold an assignment of a thing resting in mere possibility, as of wages to be earned in the future not under an existing contract or employment, if based on a valuable consideration, the assignment taking effect when the thing comes into existence. Field v. Mayor, 6 N. Y. 179, 57 Am. Dec. 435; Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; Patterson v. Caldwell, 124 Pa. 455, 17 Atl. 18, 10 Am. St. Rep. 598. *See "Assignments," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 25–31.*

[64] Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87; Carter v. Nichols, 58 Vt. 553, 5 Atl. 197; Getchell v. Maney, 69 Me. 442; Beardsley v. Morgner 73 Mo. 22; Tripp v. Brownell, 12 Cush. (Mass.) at page 382; Gibson v. Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194; Milroy v. Iron Co., 43 Mich. 231, 5 N. W. 287; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Philadelphia's Appeal, 86 Pa. 179; Dean v. St. Paul & D. R., 53 Minn. 504, 55 N. W. 628; Kansas City, M. & B. R. v. Robertson, 109 Ala. 296, 19 South. 432; Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426; Rivers v. A. & C. Wright & Co., 117 Ga. 81, 43 S. E. 499. Where a contract for work provides for payment in installments, each installment is a separate demand, and may be assigned. Adler v. Railroad Co., 92 Mo. 242, 4 S. W. 917. *See "Assignments," Dec. Dig. (Key-No.) §§ 30, 58; Cent. Dig. §§ 55–60, 121–123.*

[65] National Exch. Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388; Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555; Field v. City of New York, 6 N. Y. 179, 57 Am. Dec.

Same—Form of Assignment

No particular form for an assignment is necessary, unless it is required by statute. In the absence of a statute an equitable assignment may be made without any deed or writing, by any words or acts showing a clear intention to assign.[66] An order made by a creditor on his debtor to pay the debt to another would amount to an equitable assignment of the debt to the person in whose favor it is made or to whom it is given.[67] An assignment may be conditional, or as security, as well as absolute.[68]

By statute in some of the states, allowing assignments of choses in action at law, and suit by the assignee in his own name, it is required that the assignment shall be in writing, signed by the assignor or his agent. If it is not in such a form, it is only an equitable assignment, and suit, if in the assignee's name, must be brought

435; Risley v. Bank, 83 N. Y. 318, at page 329, 38 Am. Rep. 421; Daniels v. Meinhard, 53 Ga. 359; Fordyce v. Nelson, 91 Ind. 447; Harris Co. v. Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Etheridge v. Vernoy, 74 N. C. 800; Bower v. Stone Co., 30 N. J. Eq. 171; County of Des Moines v. Hinkley, 62 Iowa, 637, 17 N. W. 915; Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Warren v. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; The Elmbank (D. C.) 72 Fed. 610; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707. Contra, Burnett v. Crandall, 63 Mo. 410; Gardner v. Smith, 5 Heisk. (Tenn.) 256. Some cases maintain that consent of the debtor is necessary even in equity. Story, J., in Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87. See James v. Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; Kingsbury v. Burrill, 151 Mass. 199, 24 N. E. 36. *See "Assignments," Dec. Dig. (Key-No.) §§ 30, 58; Cent. Dig. §§ 55–60, 121–123.*

[66] Leake, Cont. 603; Row v. Dawson, 1 Ves. Sr. 331; Heath v. Hall, 4 Taunt. 326; Bower v. Stone Co., 30 N. J. Eq. 171; Tingle v. Fisher, 20 W. Va. 497; Shannon v. City of Hoboken, 37 N. J. Eq. 123; Crane v. Gough, 4 Md. 316; Watson v. Bagley, 12 Pa. 164, 51 Am. Dec. 595; Bank of Commerce v. Bogy, 44 Mo. 13, 100 Am. Dec. 247; Tone v. Shankland, 110 Iowa, 525, 81 N. W. 789. It is said that an assignment will not be supported unless consideration has been given by the assignee. Anson, Cont. (8th Ed.) 238. But the debtor cannot defend on the ground that the assignment was without consideration. Coe v. Hinkley, 109 Mich. 608, 67 N. W. 915; Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Forsyth v. Ryan, 17 Colo. App. 511, 68 Pac. 1055; Henderson v. Railway Co., 131 Mich. 438, 91 N. W. 630. But see Waterman v. Merrow, 94 Me. 237, 47 Atl. 157. Want of consideration may affect rights of assignee as against assignor's creditors. In re Doringh, 20 R. I. 459, 40 Atl. 4. *See "Assignments," Dec. Dig. (Key-No.) § 31; Cent. Dig. § 61.*

[67] Story, Eq. Jur. § 1044; Mandeville v. Welch, 5 Wheat. 285, 5 L. Ed. 87; Switzer v. Noffsinger, 82 Va. 518; Wilson v. Carson, 12 Md. 54. *See "Assignments," Dec. Dig. (Key-No.) §§ 31, 50; Cent. Dig. §§ 61, 99.*

[68] Draper v. Fletcher, 26 Mich. 154; Herbstreit v. Beckwith, 35 Mich. 93; Gill v. Weller, 52 Md. 8; Hunting v. Emmart, 55 Md. 265. An assignment may be illegal and contrary to public policy (ante, pp 354, 374). *See "Assignments," Dec. Dig. (Key-No.) § 82; Cent. Dig. § 134.*

in equity, or, if suit is brought at law, it must be in the name of the assignor.[69]

Same—Notice of Assignment

The assignment is complete as between the assignor and the assignee, or those standing in their shoes and representing them, without any notice to the debtor or person liable;[70] but it will not bind the debtor until he has received notice of it.[71] A person liable under a contract has a right to know to whom his liability is due, and therefore, if he receives no notice that it is due to another than the party with whom he originally contracted, and pays the latter, he is entitled to credit for the payment.[72] If, for instance, a mortgage is assigned by the mortgagee without notice to the mortgagor, and the mortgagor afterwards pays to the mortgagee, the payment is good as against a subsequent claim by the assignee.[73] The reason of the rule has been thus stated: "The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has therefore required notice to be given to

[69] Tradesmen's Nat. Bank of Philadelphia v. Green, 57 Md. 602; Mutual Life Ins. Co. v. Watson (C. C.) 30 Fed. 653 (Georgia statute); Chamberlin v. Gilman, 10 Colo. 94, 14 Pac. 107. *See "Assignments," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 76, 77.*

[70] Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Wood v. Partridge, 11 Mass. 488; Thayer v. Daniels, 113 Mass. 129; Burn v. Carvalho, 4 Mylne & C. 690; Bishop v. Holcomb, 10 Conn. 444; Kafes v. McPherson (N. J. Ch.) 32 Atl. 710; Marsh v. Garney, 69 N. H. 236, 45 Atl. 745. *See "Assignments," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 116–120.*

[71] Stebbins v. Bruce, 80 Va. 389; Fraley's Appeal, 76 Pa. 42; Bostwick v. Bryant, 113 Ind. 448, 16 N. E. 378; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240; Winberry v. Koonce, 83 N. C. 351; Porter v. Dunlap, 17 Ohio St. 591; Shade v. Creviston, 93 Ind. 591. In case of bankruptcy of the debtor before notice, it would pass to his assignees in bankruptcy. Ryall v. Rowles, 1 Ves. Sr. 348; Dean v. James, 1 Adol. & E. 809. Otherwise where notice has been received before bankruptcy. Crowfoot v. Gurney, 9 Bing. 372; Hutchinson v. Heyworth, 9 Adol. & E. 375. *See "Assignments," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 116–120.*

[72] Robinson v. Marshall, 11 Md. 251. *See "Assignments," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 116–120.*

[73] Williams v. Sorrell, 4 Ves. 389; Van Keuren v. Corkins, 66 N. Y. 77. *See "Mortgages," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 673–675.*

the debtor of the assignment in order to perfect the title of the assignee." [74]

The notice need not be given in any formal manner, provided it is such as to inform the debtor of the assignment.[75] After notice of the assignment, he cannot refuse to be bound by it;[76] and a payment by him to the original debtor will not discharge the debt.[77]

Same—Title of Assignee

A person cannot acquire title to a chose in action from one who has himself no title to it. And if a man takes an assignment of a chose in action, he takes his chance as to the exact position in which the party giving it stands. In other words, the assignee of a chose in action takes it subject to all the equities of the debtor against the assignor existing at the time he received notice of the assignment.[78] If the debtor, for instance, has a right of set-off against

[74] Stocks v. Dobson, 4 De Gex, M. & G. 15. *See "Assignments," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 116–120.*

[75] Smith v. Smith, 2 Cromp. & M. 231; Anderson v. Van Alen, 12 Johns. (N. Y.) 343; Meux v. Bell, 1 Hare, 73; Edwards v. Scott, 1 Man. & G. 962; Heermans v. Ellsworth, 64 N. Y. 159; Tibbits v. George, 5 Adol. & E. 107; Riley v. Taber, 9 Gray (Mass.) 372; Barron v. Porter, 44 Vt. 587; Dale v. Kimpton, 46 Vt. 76; Bean v. Simpson, 16 Me. 49; Kellogg v. Krauser, 14 Serg. & R. (Pa.) 137, 16 Am. Dec. 480; Guthrie v. Bashline, 25 Pa. 80; Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426. *See "Assignments," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 116–120.*

[76] Tibbits v. George, 5 Adol. & E. 107; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Switzer v. Noffsinger, 82 Va. 518; Savage v. Gregg, 150 Ill. 161, 37 N. E. 312. *See "Assignments," Dec. Dig. (Key-No.) § 57; Cent. Dig. §§ 116–120.*

[77] Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Brice v. Bannister, 3 Q. B. Div. 569; Hall v. Insurance Co., 111 Mass. 53, 15 Am. Rep. 1; Whitman v. Arms Co., 55 Conn. 247, 10 Atl. 571; Shriner v. Lamborn, 12 Md. 170; Kitzinger v. Beck, 4 Colo. App. 206, 35 Pac. 278; Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859. *See "Assignments," Dec. Dig. (Key-No.) § 93; Cent. Dig. § 159.*

[78] Crouch v. Credit Foncier, L. R. 8 Q. B. 380; Mangles v. Dixon, 3 H. L. Cas. 702, 735; Clute v. Robison, 2 Johns. (N. Y.) 595; Littlefield v. Bank, 97 N. Y. 581; Callanan v. Edwards, 32 N. Y. 483; Kleeman v. Frisbie, 63 Ill. 482; Buckner v. Smith, 1 Wash. (Va.) 296, 1 Am. Dec. 463; Kamena v. Huelbig, 23 N. J. Eq. 78; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Edson v. Gates, 44 Mich. 253, 6 N. W. 645; Barney v. Grover, 28 Vt. 391; Martin v. Richardson, 68 N. C. 255; Lane v. Smith, 103 Pa. 415; Willis v. Twambly, 13 Mass. 204; Shade v. Creviston, 93 Ind. 591; Goldsborough v. Cradie, 28 Md. 477; Boardman v. Hayne, 29 Iowa, 339; Russell v. Kirkbride, 62 Tex. 455; Hill v. McPherson, 15 Mo. 204, 55 Am. Dec. 142; Third Nat. Bank of Atlanta v. Railroad Co., 114 Ga. 890, 40 S. E. 1016. If the debtor does anything to mislead the assignee, he may be estopped; and in this way the assignee may get a better title than his assignor. Holbrook v. Burt, 22 Pick. (Mass.) 546; Kemp's Ex'x v. McPherson, 7 Har. & J. (Md.) 320; Johnston v. Insurance Co., 39 Md. 233; Woodson v. Barrett, 2 Hen. & M. (Va.) 80, 3

the debt at the time of the assignment, he may enforce the right as against the assignee;[79] and, as we have already seen, he may enforce a right of set-off acquired after the assignment, but before he received notice of it.[80] Since, however, notice thereof completes the assignment as against the debtor, he cannot set off a claim afterwards acquired.[81] So, also, if a party is induced to enter into a contract by fraud, and the fraudulent party assigns his interest in the contract, the party defrauded may have the contract set aside in equity in spite of the assignment, and this though the assignee may have paid full value, and may have been wholly innocent.[82]

It seems that the parties to a contract may stipulate that, if either assign his rights under it, the assignment shall be "free from equities;" that is to say, that the assignee shall not be liable to be met by such defenses as would have been valid against his assignor.[83]

Am. Dec. 612; Scott v. Sadler, 52 Pa. 211; Buckner v. Smith, 1 Wash. (Va.) 296, 1 Am. Dec. 463; Boardman v. Hayne, 29 Iowa, 339. Equities which may be interposed as defenses against the assignee of a nonnegotiable instrument are only such as are inherent in the contract evidenced by the instrument, and which exist at the time of the assignment. Merchants' Bank of Buffalo v. Weill, 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605. *See "Assignments," Dec. Dig. (Key-No.) § 90; Cent. Dig. § 156.*

[79] Story, Eq. Jur. § 1047; Cavendish v. Greaves, 24 Beav. 163; Massachusetts Loan & Trust Co. v. Welch, 47 Minn. 183, 49 N. W. 740; Greene v. Hatch, 12 Mass. 195; Zabriskie v. Railroad Co., 131 N. Y. 72, 29 N. E. 1006; Wood v. City of New York, 73 N. Y. 556; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; First Nat. Bank of New Windsor v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Hooper v. Brundage, 22 Me. 460; Hunt v. Shackleford, 55 Miss. 94; Sanborn v. Little, 8 N. H. 539; Littlefield v. Bank, 97 N. Y. 581; Jack v. Davis, 29 Ga. 219. An unmatured debt, existing at the time of the assignment, cannot be set off. Roberts v. Carter, 38 N. Y. 107; Chambliss v. Matthews, 57 Miss. 306; Backus v. Spaulding, 129 Mass. 234; Adams v. Rodarmel, 19 Ind. 339; Graham v. Tilford, 1 Metc. (Ky.) 112; Follett v. Buyer, 4 Ohio St. 586. *See "Assignments," Dec. Dig. (Key-No.) § 100; Cent. Dig. §§ 177, 180.*

[80] McCabe v. Gray, 20 Cal. 509; Abshire v. Corey, 113 Ind. 484, 15 N. E. 685; Faulknor v. Swart, 55 Hun, 261, 8 N. Y. Supp. 239; Adams v. Leavens, 20 Conn. 73. *See "Assignments," Dec. Dig. (Key-No.) § 101; Cent. Dig. § 182.*

[81] Goodwin v. Cunningham, 12 Mass. 193; St. Andrew v. Manufacturing Co., 134 Mass. 42; Weeks v. Hunt, 6 Vt. 15; Crayton v. Clark, 11 Ala. 787. *See "Assignments," Dec. Dig. (Key-No.) § 101; Cent. Dig. § 187.*

[82] Graham v. Johnson, L. R. 8 Eq. 38; Holbrook v. Burt, 22 Pick. (Mass.) 546. But see Bloomer v. Henderson, 8 Mich. 395, 77 Am. Dec. 453. *See "Assignments," Dec. Dig. (Key-No.) § 100; Cent. Dig. §§ 177, 180.*

[83] Ex parte Asiatic Banking Corp., 2 Ch. App. 397. "It is questionable, however, whether such a stipulation would protect the assignee against the effects of fraud, or any vital defect in the formation of the original contract." Anson, Cont. (8th Ed.) 238. *See "Assignments," Dec. Dig. (Key-No.) § 100; Cent. Dig. §§ 177, 180.*

Same—Priority between Assignees

It is held in England that "equitable titles have priority according to the priority of notice;" [84] that the successive assignees of an obligation rank as to their title according to the dates at which they gave notice to the party to be charged. This doctrine is also recognized by the courts of some of our states, and by the supreme court of the United States.[85] The courts of many of the states, on the other hand, hold that equitable titles have priority, not according to the priority of notice, but according to priority in time of assignment, on the ground that as between assignor and assignee the assignment is complete without any notice to the debtor, and that a purchaser of a chose in action must always abide by the case of the person from whom he buys.[86]

Under Statutes

In most of the states, statutes have been enacted changing the common-law rules in relation to assignments of choses in action. These statutes vary somewhat, so that it would be impracticable to attempt to set them out. In most states it is substantially provided that the assignee of a chose may sue the debtor in his own name in the same manner as the assignor might have done before the assignment. In some states the same result is accomplished by statutes requiring actions to be brought in the name of the "real party in interest." It may be said generally that the effect of the statutes is to put an assignment of a chose in action on the same footing at law as in equity. What we have said, therefore, in treating of assignments in equity, generally applies to assignments at law under the statutes.[87]

[84] Stocks v. Dobson, 4 De Gex, M. & G. 15. *See "Assignments," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 149–151.*

[85] Ward v. Morrison, 25 Vt. 593; Murdoch v. Finney, 21 Mo. 138; Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; White's Heirs v. Prentiss' Heirs, 3 T. B. Mon. (Ky.) 449; Judson v. Corcoran, 17 How. 612, 15 L. Ed. 231; Spain v. Brent, 1 Wall. 624, 17 L. Ed. 619; Laclede Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704; In re Gillespie (D. C.) 15 Fed. 734; Methven v. Power Co., 66 Fed. 113, 13 C. C. A. 362; Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26; Township of Washington v. First Nat. Bank, 147 Mich. 571, 111 N. W. 349, 11 L. R. A. (N. S.) 471. *See "Assignments," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 149–151.*

[86] Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Thayer v. Daniels, 113 Mass. 129; Kamena v. Huelbig, 23 N. J. Eq. 78; Tingle v. Fisher, 20 W. Va. 497; Newby v. Hill, 2 Metc. (Ky.) 530; Ohio Life Ins. & Trust Co. v. Ross, 2 Md. Ch. 25; MacDonald v. Kneeland, 5 Minn. 352 (Gil. 283); Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572. *See "Assignments," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 149–151.*

[87] ALLEN v. BROWN, 44 N. Y. 228, Throckmorton Cas. Contracts, 327;

Negotiable Instruments

It remains to mention a class of promises the benefit of which is transferable, under the law merchant, in such a way that the promise may be enforced by the transferee in his own name, without notice to the promisor, and under certain circumstances without risk of being met by many of the defenses which would have prevailed as against his transferror. These contracts are called "negotiable" instruments, for the reason that they may be transferred by "negotiation" as distinguished from "assignment." They include bills of exchange, promissory notes, checks, some classes of corporate bonds for the payment of money, and some other instruments. Most of these instruments are negotiable by the custom of merchants recognized by the courts. Some instruments are negotiable by statute. Promissory notes were put upon the same footing as bills of exchange by the statute of 3 & 4 Anne, c. 9, §§ 1–3, although this statute is generally regarded as only declaratory of the law.

Negotiation means transfer in the form and manner prescribed by the law merchant. If the instrument is payable to order, it is transferable by indorsement; if payable to bearer, by mere delivery.[88] The usual form of indorsement is the signature of the indorser, with or without a direction to pay to a specified indorsee or to his order. If the indorsee is specified, the indorsement is necessary to the further negotiation of the instrument; but if the indorsement specifies no indorsee, the instrument becomes in effect payable to bearer, and may be further negotiated by delivery.[89]

The effect of negotiation is (1) to transfer the legal title to the transferee, so that he may sue upon the instrument in his own name;[90] and (2) if the transferee is a purchaser for value, before maturity of the instrument, and without notice of facts which would impeach its validity between antecedent parties, he may enforce payment, notwithstanding defenses (other than those which attach to the instrument itself and are good against all persons) which would have been good against his transferror or other prior parties.[91] Notice of the transfer need not be given to the party liable. Consideration is presumed to be given until the contrary

Dakin v. Pomeroy, 9 Gill (Md.) 1; Doering v. Kenamore, 86 Mo. 588; Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200; Jordan v. Thornton, 7 Ark. 224, 44 Am. Dec. 546. *See "Assignments," Dec. Dig. (Key-No.) §§ 1–3; Cent. Dig. §§ 1–5.*

88 Norton, Bills & N. (3d Ed.) 200–206.

89 Norton, Bills & N. (3d Ed.) 105–118.

90 Norton, Bills & N. (3d Ed.) 207–215.

91 Norton, Bills & N. (3d Ed.) 216 et seq.

appears, although the burden of proof may be changed if it appears that there was fraud or illegality in the issue or subsequent negotiation of the instrument.[92]

Negotiable instruments may be transferred by assignment as well as by negotiation, but in such case only the equitable as distinguished from the legal title is transferred, and the incidents of the transfer are substantially the same as in the case of the transfer of a mere chose in action, the assignee standing in no better position than his assignor.[93] It would be beyond the scope of this book to go further into the law of negotiable instruments.

SAME—ASSIGNMENT BY OPERATION OF LAW

198. Rules of law operate to transfer rights and liabilities arising out of a contract, under certain circumstances and to a certain extent, in the following cases:

(a) Upon the transfer of an interest in land.
(b) Upon a woman's marriage.
(c) By death.
(d) By bankruptcy.

We have thus far dealt with the manner in which the parties to a contract may by their own acts assign to others the benefits or liabilities of the contract. It remains now to show how these rights and liabilities may pass by operation of law.

SAME—ASSIGNMENT OF OBLIGATIONS ON TRANSFER OF INTERESTS IN LAND

199. If a person, by purchase or lease, acquires an interest in land from another, on terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest will operate as a transfer of these obligations to the assignee as follows:

[92] Norton, Bills & N. (3d Ed.) 327.

[93] Edge v. Bumford, 31 L. J. Ch. 805; Central Trust Co. v. Bank, 101 U. S. 68, 25 L. Ed. 876; Osgood's Adm'rs v. Artt (C. C.) 17 Fed. 575; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St Rep. 765; Norton, Bills & N. (3d Ed.) 196, 200. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 310–313; Cent. Dig. §§ 742–750.*

(a) Covenants affecting leasehold interests,
  (1) If they touch and concern the thing demised, and relate to something which was in existence at the time of the lease, pass to the assignee, though not expressed to have been made with the lessee "and his assigns."
  (2) If they relate to something not in existence at the time of the lease, they pass to the assignee, if expressed as made with the lessee "and assigns."
  (3) In no case do merely personal or collateral covenants between the landlord and lessee pass to the latter's assignee.
  (4) The reversioner or landlord does not at common law, by assigning his interest in the land, convey his rights and liabilities to the assignee, but this is very generally changed by statute.

(b) Covenants affecting freehold interests,
  (1) If made to the owner of the land, and for his benefit, pass to his assignees, provided they touch and concern the land, and are not merely personal.
  (2) If made by the owner, restricting his enjoyment of the land, they do not, at common law, bind his assignees, except in case of well-known interests, such as easements, recognized by law. In equity, however, it is otherwise in case of certain covenants of which the assignee had notice at the time of his purchase.[94]

Covenants Affecting Leasehold Interests

At common law, covenants affecting leasehold interests are said to "run with the land, and not with the reversion"; that is to say, they pass upon an assignment of the lease, but not upon an assignment or transfer of the reversion. If a lessee assigns his lease, the assignee, in certain cases, will be bound to the landlord by the same liabilities, and entitled to the same rights, as his assignor. The extent to which this is so may be stated thus:

(1) Covenants in a lease which "touch and concern the thing demised" [95] pass to the lessee's assignee, and it is not necessary

[94] Following substantially Anson, Cont. (4th Ed.) 232.

[95] As to the meaning of this term, see Masury v. Southworth, 9 Ohio St. 341; Wiggins Ferry Co. v. Railroad Co., 94 Ill. 83; Norman v. Wells, 17 Wend. (N. Y.) 136; Peden v. Railway Co., 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680; Kettle R. R. Co. v. Railway Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; Norfleet v. Cromwell, 70 N. C. 634, 16 Am. Rep. 787; Pittsburgh, Ft. W. & C. R. Co. v. Reno, 123 Ill. 273, 14 N. E. 195; Lyford v. Railroad Co.,

in such case that the covenants be expressed to have been made with the lessee "and his assigns." Of this class are covenants to repair, or to leave in good repair, or to deal with the land in any specified manner. Such covenants touch and concern the land, which is the thing demised.[96]

(2) Covenants in a lease which touch and concern the thing demised, but relate to something not in existence at the time of the lease, pass to the lessee's assignee only where the covenant is expressly made with the lessee "and assigns." [97]

(3) In no case does the assignee of a lease acquire benefit or incur liability from merely personal or collateral covenants made between the lessee and landlord. For instance, where a lessee of land covenanted to use the premises as a schoolhouse, and the lessor covenanted not to build or keep any house for the sale of intoxicating liquor within a certain distance of the premises, it was held that the benefit of the lessor's covenant did not pass to the assignee of the lease.[98]

92 Cal. 93, 28 Pac. 103. *See "Landlord and Tenant," Dec. Dig. (Key-No.) § 44; Cent. Dig. §§ 108–110.*

[96] Spencer's Case, 1 Smith, Lead. Cas. 168, and cases collected in note; GORDON v. GEORGE, 12 Ind. 408, Throckmorton Cas. Contracts, 328; Norman v. Wells, 17 Wend. (N. Y.) 136; Suydam v. Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; Leppla v. Mackey, 31 Minn. 75, 16 N. W. 470; Donelson v. Polk, 64 Md. 501, 2 Atl. 824; Demarest v. Willard, 8 Cow. (N. Y.) 206; Callan v. McDaniel, 72 Ala. 96; Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303; Fitch v. Johnson, 104 Ill. 111; Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75. *See "Landlord and Tenant," Dec. Dig. (Key-No.) § 152; Cent. Dig. § 552.*

[97] Minshull v. Oakes, 2 Hurl. & N. 808; Spencer's Case, 1 Smith, Lead. Cas. 168; Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Newburg Petroleum Co. v. Weare, 44 Ohio St. 604, 9 N. E. 845; Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Coffin v. Talman, 8 N. Y. 465; Tallman v. Coffin, 4 N. Y. 134; Masury v. Southworth, 9 Ohio St. 340; Dorsey v. Railroad Co., 58 Ill. 65; Cronin v. Watkins, 1 Tenn. Ch. 119; Bream v. Dickerson, 2 Humph. (Tenn.) 126; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175. *See "Landlord and Tenant," Dec. Dig. (Key-No.) § 44; Cent. Dig. §§ 108–110.*

[98] Thomas v. Haywood, L. R. 4 Exch. 311. The lessee cannot, by assigning the lease, release himself from his express covenants—as to pay rent. He cannot escape this liability without the landlord's consent, and the latter's mere assent to the assignment does not amount to a release. Pfaff v. Golden, 126 Mass. 402; Oswald v. Fratenburgh, 36 Minn. 270, 31 N. W. 173; Greenleaf v. Allen, 127 Mass. 248; Nova Cesarea Harmony Lodge No. 2 v. White, 30 Ohio St. 569, 27 Am. Rep. 492; Harris v. Heackman, 62 Iowa, 411, 17 N. W. 592; Wilson v. Gerhardt, 9 Colo. 585, 13 Pac. 705; Ghegan v. Young, 23 Pa. 18. If the landlord accepts the sublessee as tenant, and releases the lessee, it is otherwise. See Colton v. Gorham, 72 Iowa, 324, 33 N. W. 76. *See "Landlord and Tenant," Dec. Dig. (Key-No.) §§ 44, 152, 208; Cent. Dig. §§ 108–110, 552, 821.*

At common law, the assignment of his interest by the reversioner or landlord does not convey his rights and liabilities to his assignee. The law in this respect, however, was changed in England by a statute in the reign of Henry VIII,[99] under which the assignee of the reversion is enabled to take the benefits and also incurs the liabilities of covenants entered into with his assignor. This statute is recognized as a part of the common law in some of our states, while in others similar statutes have been enacted.[1] The rules as to the connection of the covenants with the thing demised apply to such as run with the reversion equally with those that run with the land; that is to say, they must "touch and concern the thing demised," and not be merely personal or collateral.[2]

Covenants Affecting Freehold Interests

At common law, covenants entered into with the owner of land —that is to say, promises under seal made to the owner of land, and for his benefit—pass to his assignees, provided, as in other cases, they touch and concern the land conveyed, and are not merely personal.[3] For instance, if the vendor of land covenants with the purchaser that he has a good right to convey the land, the benefit of the covenant will pass to an assignee of the purchaser;[4] but it would

[99] 32 Hen. VIII, c. 34.

[1] Baldwin v. Walker, 21 Conn. 168; Howland v. Coffin, 12 Pick. (Mass.) 125; Perrin v. Lepper, 34 Mich. 295. Where statute requires actions to be brought in name of real party in interest, it is held that action on covenants of lease may be brought by assignee of reversioner. See Masury v. Southworth, 9 Ohio St. 340; Smith v. Harrison, 42 Ohio St. 180. *See "Landlord and Tenant," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 129–135.*

[2] Spencer's Case, 1 Smith, Lead. Cas. 168. *See "Landlord and Tenant," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 129–135.*

[3] Horn v. Miller, 136 Pa. 640, 20 Atl. 706, 9 L. R. A. 810; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Peden v. Railway Co., 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190; St. Louis, I. M. & S. Ry. Co. v. O'Baugh, 49 Ark. 418, 5 S. W. 711; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Hallenbeck v. Kindred, 109 N. Y. 620, 15 N. E. 887; Scott v. Stetler, 128 Ind. 385, 27 N. E. 721; De Gray v. Clubhouse Co., 50 N. J. Eq. 329, 24 Atl. 388; Lucas v. Turnpike Co., 36 W. Va. 427, 15 S. E. 182; Inhabitants of Middlefield v. Knitting Co., 160 Mass. 267, 35 N. E. 780. Covenant against paramount ground rent. Providence Life & Trust Co. v. Fiss, 147 Pa. 232, 23 Atl. 560. *See "Covenants," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 22, 52.*

[4] Suydam v. Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; Beddoe's Ex'r v. Wadsworth, 21 Wend. (N. Y.) 120; Tillotson v. Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Flaniken v. Neal, 67 Tex. 629, 4 S. W. 212; Wead v. Larkin, 54 Ill. 489, 5 Am. Rep. 149; Thomas v. Bland, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142; Butler v. Barnes, 60 Conn. 170, 21 Atl.

be otherwise in case of a covenant relating to a matter purely personal between the covenantor and covenantee.[5]

On the other hand, covenants entered into by the owner of land which restrict his enjoyment of the land do not, at common law, bind his assignee, except where he creates certain well-known interests, such as easements, recognized by the common law.[6] If a man endeavors to create restrictions on his land other than such intetests, he cannot so affix them to the land as to bind subsequent owners. As said by Lord Brougham: "It must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. * * * Great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote." [7]

Same—In Equity

Courts of equity, however, have established a class of exceptions to the above rule. They have been mainly confined to covenants in

419, 12 L. R. A. 273. But see Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Id., 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850. *See "Covenants," Dec. Dig. (Key-No.) §§ 53–56; Cent. Dig. §§ 22, 52, 53.*

[5] Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Masury v. Southworth, 9 Ohio St. 340; Glenn v. Canby, 24 Md. 127; Indianapolis Water Co. v. Nulte, 126 Ind. 373, 26 N. E. 72; Brewer v. Marshall, 18 N. J. Eq. 337; Id., 19 N. J. Eq. 537, 97 Am. Dec. 679; Costigan v. Railroad Co., 54 N. J. Law, 233, 23 Atl. 810; Lyford v. Railroad Co., 92 Cal. 93, 28 Pac. 103. It has been held that the right to reimbursement, or liability to reimburse, for the use of a party wall, under an agreement between adjoining landowners, is personal, and that it does not run with the land. Cole v. Hughes, supra; Todd v. Stokes, 10 Pa. 155; Gibson v. Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; Nalle v. Paggi (Tex. Sup.) 9 S. W. 205, 1 L. R. A. 33. But see Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; King v. Wight, 155 Mass. 444, 29 N. E. 644; Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409. A covenant to support an old man in consideration of a conveyance by him is personal, and cannot be shifted to a purchaser of the land from the grantee. Divan v. Loomis, 68 Wis. 150, 31 N. W. 760. *See "Covenants," Dec. Dig. (Key-No.) §§ 53–56; Cent. Dig. §§ 22, 52, 53.*

[6] Gibson v. Porter (Ky.) 15 S. W. 871; Hagerty v. Lee, 54 N. J. Law, 580, 25 Atl. 319, 20 L. R. A. 631; Id., 50 N. J. Eq. 464, 26 Atl. 537; Costigan v. Railroad Co., 54 N. J. Law, 233, 23 Atl. 810. *See "Covenants," Dec. Dig. (Key-No.) § 70; Cent. Dig. §§ 70, 71.*

[7] Keppell v. Bailey, 2 Mylne & K. 517. And see Masury v. Southworth, 9 Ohio St. 340; Weld v. Nichols, 17 Pick. (Mass.) 538; Martin v. Drinan, 128 Mass. 515; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; West Virginia Transp. Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Brewer v. Marshall, 18 N. J. Eq. 337; National Union Bank at Dover v. Segur, 39 N. J. Law, 184; Dorsey v. Railroad Co., 58 Ill. 65; Kennedy v. Owen, 136 Mass. 199; Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451; Scott v. McMillan, 76

the case of land sold for building purposes, though there seems no good reason for any limitation of the principle on which they are enforced. An illustration of this class of cases is where the vendor of land covenants that he will never use the adjoining land, retained by him, otherwise than in a particular manner. Where he afterwards sells this adjoining land to one who has notice of the covenant, the latter is bound by the covenant. The principle has been thus stated: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it that the latter shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. * * * It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." [8]

SAME—ASSIGNMENT OF CONTRACTUAL OBLIGATION BY MARRIAGE

200. At common law, upon a woman's marriage the right to reduce her choses in action into possession is transferred to her husband, and he becomes liable jointly with her, during coverture, upon her antenuptial contracts. These rules are changed by statute in most jurisdictions.

At common law, a married woman is disabled from acquiring the benefits of her antenuptial contract, because she cannot sue upon

N. Y. 141; Blount v. Harvey, 51 N. C. 186; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175. *See "Covenants," Dec. Dig. (Key-No.) § 70; Cent. Dig. §§ 70, 71.*

[8] Tulk v. Moxhay, 2 Phil. 774. And see Trustees of Columbia College v. Thacher, 87 N. Y. 312, 41 Am. Rep. 365; Same v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Haskell v. Wright, 23 N. J. Eq. 389; Stines v. Dorman, 25 Ohio St. 580; Thurston v. Minke, 32 Md. 487; De Gray v. Clubhouse Co., 50 N. J. Eq. 458, 24 Atl. 388; Clark v. Martin, 49 Pa. 289. Covenant by grantor of lots, "his heirs and assigns," not to build improvement on lots retained inferior to specified qualifications, binds his subsequent grantees with notice. Halle v. Newbold, 69 Md. 265, 14 Atl. 662. It has even been held that a covenant by a vendee of land not to sell sand therefrom, the intention being to prevent competition with the vendor, is enforceable against the covenantor's grantee buying with notice. Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. Agreement for exclusive transportation of products of land by railroad to be extended or built over it will be so enforced. Kettle River R. Co. v. Railway Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111. *See "Covenants," Dec. Dig. (Key-No.) § 69; Cent. Dig. §§ 67–69.*

it apart from her husband, and she may lose them altogether, for they are vested conditionally in the husband, who may take them to himself by reduction into possession of the chose in action. He may also sue jointly with his wife for what is due on her contracts. Whatever is thus obtained passes absolutely to him. If the husband does not thus reduce his wife's choses in action into his possession, they survive to her if he dies first, or pass to her representatives if she dies in his lifetime.

At common law, the husband acquires the liabilities of the wife to the extent that he may be sued jointly with her on any contracts made by her before marriage.[9]

Statutory Changes in the Law

In England and in all of our states the common law in this respect has been very greatly changed by statute. In some states it has been virtually abolished and in these states the marriage of a woman does not in any way affect her rights or liabilities under contracts entered into before marriage.[10]

SAME—ASSIGNMENT OF CONTRACTUAL OBLIGATION BY DEATH

201. Death passes to the executors or administrators of the deceased all rights of action in respect of the personal estate, and, to the extent of his estate, all liabilities chargeable upon it. This does not include—

EXCEPTIONS—(a) Contracts depending on the personal services or skill of the deceased.

(b) Contracts the breach of which involves a purely personal loss.

On the death of a person all his personal estate passes, by operation of law, to his executors or administrators, and with it also pass all rights of action on contract which will affect such estate, and all liabilities arising out of contract which are chargeable upon it;[11]

[9] HOWARTH v. WARMSER, 58 Ill. 48, Throckmorton Cas. Contracts, 329. *See "Husband and Wife," Dec. Dig. (Key-No.) § 213; Cent. Dig. §§ 787–790.*

[10] HOWARTH v. WARMSER, supra. *See "Husband and Wife," Dec. Dig. (Key-No.) §§ 112–114; Cent. Dig. §§ 393–395.*

[11] Anson, Cont. (4th Ed.) 235; BILLINGS' APPEAL, 106 Pa. 558, Throckmorton Cas. Contracts, 830; Jewett v. Smith, 12 Mass. 309; Snodgrass v. Cabiness, 15 Ala. 160; Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357; Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 580; Shirley v. Healds, 34 N. H. 407; Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, and note, 38 Am. St. Rep. 460; Dumont v. Heighton, 14 Ariz. 25, 123 Pac. 306,

and actions on such contracts are brought by or against the personal representative in his own name.[12] Covenants, for instance, which are attached to a leasehold estate, pass, as to benefit and liability, with the personalty to the executor or administrator; but covenants affecting freehold estates, such as covenants for title in a conveyance of freehold property, pass to the heir or devisee of the realty.

This rule does not include such contracts as depend upon the personal services or the skill of the deceased, which expire on the death of either of the parties.[13] An apprenticeship contract is thus terminated by the death of the master, and no claim to the services of the apprentice survives to the executor or administrator.[14] In like manner, breach of a contract which involves a purely personal loss does not confer a right of action upon executors or administrators. Thus, where an executor sued for a breach of promise to marry his testatrix, the promise having been broken, and the right of action having accrued in her lifetime, it was held that he could not recover, as it did not clearly appear that the breach of contract had resulted in damage to the personal estate.[15]

Executors and administrators take no personal benefit from the contracts of the decedent, nor are they personally liable. They merely stand in his shoes, and represent him to the extent of his estate.

39 L. R. A. (N. S.) 1187. This subject is covered by statute in most of the states. *See "Executors and Administrators," Dec. Dig. (Key-No.) § 43; Cent. Dig. §§ 279, 281.*

[12] Potter v. Van Vranken, 36 N. Y. 619. *See "Executors and Administrators," Dec. Dig. (Key-No.) § 438; Cent. Dig. §§ 1765–1785.*

[13] Baxter v. Burfield, 2 Str. 1266; Dickinson v. Calahan's Adm'rs, 19 Pa. 227; BILLINGS' APPEAL, 106 Pa. 558, Throckmorton Cas. Contracts, 330; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821. See post, p. 596. *See "Contracts," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 1448–1456; "Master and Servant," Dec. Dig. (Key-No.) §§ 26, 28; Cent. Dig. §§ 26, 27.*

[14] Baxter v. Burfield, 2 Strange, 1266. *See "Apprentices," Dec. Dig. (Key-No.) § 10; Cent. Dig. § 20.*

[15] Chamberlain v. Williamson, 2 Maule & S. 408. And see Finlay v. Chirney, 20 Q. B. D. 494; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Smith v. Sherman, 4 Cush. (Mass.) 408; Chase v. Fitz, 132 Mass. 359; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Hovey v. Page, 55 Me. 142; Lattimore v. Simmons, 13 Serg. & R. (Pa.) 183; Grubbs v. Sult, 32 Grat. (Va.) 203, 34 Am. Rep. 765. *See "Abatement and Revival," Dec. Dig. (Key-No.) § 53; Cent. Dig. §§ 251, 252; "Contracts," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 1448–1456.*

JOINT AND SEVERAL CONTRACTS

202. A contract in which there are two or more parties on either or both sides may be—

(a) Joint;
(b) Several; or
(c) Joint and several.

Where several persons enter into a contract on the same side, either as promisors or promisees, they may do so jointly or severally, or, in the case of the persons bound, jointly and severally, making a joint promise and several distinct promises at the same time. Whether the contract is joint or several, or both joint and several, depends upon the intention of the parties, as manifested in the evidence of the contract. There are a number of rules for construing contracts, and determining this intention; but we must postpone their consideration until we come to treat of the interpretation of contracts.[16] We shall deal here only with the rules that govern the operation of the contract after such intention has been determined.

The rules which we shall state are the rules of the common law. It is never safe to assume that they are still in force in any particular jurisdiction, for they have been much modified by statute.[17]

SAME—JOINT CONTRACTS

203. Where several parties join in a promise,

(a) They are each liable for the whole debt or performance.
(b) They are jointly, and not separately, liable, and must all be sued jointly.
(c) Where one of them dies, the liability devolves upon the survivors, and, on the death of all, upon the personal representative of the last survivor.
(d) A release of one, by act of the promisee, releases all.

204. Where a promise is made to several jointly,

(a) They are entitled jointly, and not separately, and must join in a suit on the promise.
(b) Where one of them dies, the legal right devolves upon the survivors, and on them alone.

[16] Post, p. 519.

[17] A common statutory provision is that all contracts which, by the common law, are joint only, shall be construed to be joint and several. Knapp v.

Several persons may join in a contract on one side or the other, or there may be several persons on both sides. In these cases the contract is said to be a joint contract or joint debt, and the persons composing the respective parties thereto are called "joint creditors" or "joint promisees," and "joint debtors," or "joint promisors."

Joint Promisors

If several persons make a joint promise, each is liable to the promisee for the whole debt or liability, notwithstanding the fact that they are both liable.[18] Neither is bound by himself, but each is bound to the full extent of the promise. If both are living and within the jurisdiction of the court, they should all be joined as defendants in an action on the contract.[19] If one of them is sued alone, he is not bound to answer to the merits of the action without the others being sued with him. He may demur if the defect appears on the face of the pleading, or plead in abatement if it does not so appear.[20] If the defect so appears, it is fatal, not only on demurrer, but on motion in arrest of judgment.[21] If it does not so appear, the objection must be taken

Hanley, 153 Mo. App. 169, 132 S. W. 747. *See "Contracts," Dec. Dig. (Key-No.) §§ 182–184; Cent. Dig. §§ 780–789.*

[18] Baum v. McAfee (Tex. Civ. App.) 125 S. W. 984. An agreement between two joint obligors that they shall each be severally liable for one-half the obligation is not binding upon the obligee. Knowlton v. Parsons, 198 Mass. 439, 84 N. E. 798. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[19] Smith v. Miller, 49 N. J. Law, 521, 13 Atl. 39; Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088; Van Leyen v. Wreford, 81 Mich. 606, 45 N. W. 1116; Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491; Walker v. Bank, 5 C. C. A. 421, 56 Fed. 76; Allin v. Shadburne's Ex'r, 1 Dana (Ky.) 68, 25 Am. Dec. 121; O'Brien v. Bound, 2 Speer (S. C.) 495, 42 Am. Dec. 384; McCall v. Price, 1 McCord (S. C.) 82; Meyer v. Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283. An understanding between the promisors themselves that one of them shall pay or perform the whole debt or promise does not affect the rule. Lodge v. Dicas, 3 Barn. & Ald. 611. A familiar illustration of joint promises is in the case of partnership debts. All the partners must be sued. In some states it is provided by statute that all contracts which by common law are joint only shall be construed to be joint and several. Belleville Sav. Bank v. Winslow (C. C.) 30 Fed. 488; Wibaux v. Live Stock Co., 9 Mont. 154, 22 Pac. 492. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[20] Rice v. Shute, 5 Burrows, 2611; CITY OF PHILADELPHIA v. REEVES & CABOT, 48 Pa. 472, Throckmorton Cas. Contracts, 333; State v. Chandler, 79 Me. 172, 8 Atl. 553; Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338; Smith v. Miller, 49 N. J. Law, 521, 13 Atl. 39; Seymour v. Minturn, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; Bledsoe v. Irvin, 35 Ind. 293; Henderson v. Hammond, 19 Ala. 340; Potter v. McCoy, 26 Pa. 458. *See "Contracts," Dec. Dig. (Key-No.) § 187; Cent. Dig. §§ 780–787.*

[21] Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Bragg v. Wetzel, 5 Blackf.

by plea in abatement; and, if the defendant pleads to the merits, he cannot object that others were jointly liable with him;[22] for, when two are jointly bound in one bond or on one promise, though neither of them is bound by himself, yet neither of them can say that it is not his deed or promise.[23]

Same—Survivorship

Upon the death of one of several joint promisors, the liability devolves upon the survivors. The personal representative of the deceased promisor cannot be sued jointly with the survivors. The whole liability, in this way, ultimately devolves upon the last surviving promisor, and, after his death, upon his representative.[24] The estate of a deceased joint debtor may be charged in equity, unless he was merely a surety, and received no benefit from the contract.[25]

(Ind.) 95; Sweigart v. Berk, 8 Serg. & R. 308; McGregor v. Balch, 17 Vt. 567; Sinsheimer v. Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[22] Rice v. Shute, 5 Burrows, 2611; Richards v. Heather, 1 Barn. & Ald. 29; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Elder v. Thompson, 13 Gray (Mass.) 91; Maurer v. Midway, 25 Neb. 575, 41 N. W. 395; Mountstephen v. Brooke, 1 Barn. & Ald. 224; First Nat. Bank v. Hamor, 7 U. S. App. 69, 1 C. C. A. 153, 49 Fed. 45; Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338; Hicks v. Cram, 17 Vt. 449; Lieberman v. Brothers, 55 N. J. Law, 379, 26 Atl. 828; Coon v. Anderson, 101 Mich. 295, 59 N. W. 607. Where joint debtors are sued jointly, and a joint judgment recovered, the whole amount of the judgment may be levied against one. Bird v. Randall, 1 W. Bl. 388. Where judgment is thus obtained against less than all the joint debtors, it merges or extinguishes the right of action as against all. King v. Hoare, 13 Mees. & W. 494; Kendall v. Hamilton, 4 App. Cas. 504; Mason v. Eldred, 6 Wall. 231, 18 L. Ed. 783; Ward v. Johnson, 13 Mass. 148. Otherwise where the judgment is recovered against one of the joint debtors on a check given by him for the demand. Prosser v. Evans, 1 Q. B. (1895) 108. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[23] Whelpdale's Case, 5 Coke, 119; Rice v. Shute, 5 Burrows, 2613. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[24] Richards v. Heather, 1 Barn. & Ald. 29; Gere v. Clark, 6 Hill (N. Y.) 350; Brown v. Benight, 3 Blackf. (Ind.) 37, 23 Am. Dec. 373; Foster v. Hooper, 2 Mass. 572; Stevens v. Catlin, 152 Ill. 56, 37 N. E. 1023; Hoskinson v. Eliott, 62 Pa. 393; Atwell's Adm'rs v. Milton, 4 Hen. & M. (Va.) 253; Clark's Ex'rs v. Parish's Ex'rs, 1 Bibb (Ky.) 547; Murphy v. Weil, 92 Wis. 467, 66 N. W. 532. As to the effect of the death of a joint debtor after judgment, see Leake, Cont. 215; Harbart's Case, 3 Coke, 14a. The doctrine of survivorship is virtually abolished by statute in most states. Taylor v. Taylor, 5 Humph. (Tenn.) 110; Williams v. Bradley, 5 Ohio Cir. Ct. R. 114; Fisher v. Hopkins, 4 Wyo. 379, 34 Pac. 899; Bachelder v. Fiske, 17 Mass. 464. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[25] Davis v. Van Buren, 72 N. Y. 587; Richardson v. Draper, 87 N. Y. 337. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

Same—Release

At common law, a release of one joint debtor by operation of law—as by a discharge in bankruptcy or insolvency—does not affect the liability of the others.[26] It is otherwise, however, where the release is by an act of the creditor. In the latter case the other debtors are discharged.[27] A mere covenant not to sue one joint debtor, it seems, does not operate as a discharge of the others.[28]

Joint Promisees

Where the contract is joint on the part of the promisees, all must join in suing upon it.[29] Even a disclaimer by one, if without the assent of the promisor, will not entitle the others to sue alone.[30] If one of them is not joined as a plaintiff, the defendant may plead in abatement; but failure to do so will not constitute a waiver of the defect.[31]

[26] Leake, Cont. 214. Otherwise if creditor presents claim, under statute providing that creditor so doing shall be barred. Mungan v. French, 60 N. J. Law, 12, 36 Atl. 771. *See "Release," Dec. Dig. (Key-No.) § 28; Cent. Dig. §§ 57–62.*

[27] Brooks v. Stuart, 9 Adol. & E. 854; Maslin's Ex'rs v. Hiett, 37 W. Va. 15, 16 S. E. 437; Rowley v. Stoddard, 7 Johns. (N. Y.) 207; Hale v. Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; Goldbeck v. Bank, 147 Pa. 267, 23 Atl. 565; Lunt v. Stevens, 24 Me. 534; Allin v. Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Newcomb v. Raynor, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219. This is changed by statute in some states. Otherwise if the instrument shows a contrary intention, as by a reservation of rights against other parties. North v. Wakefield, 13 Q. B. 536; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; Whittemore v. Judd Linseed & Sperm Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708; Parsons, Cont. 29. See article by Professor Samuel Williston on "Releases and Covenants not to Sue Joint, or Joint and Several Debtors," 25 Harv. L. Rev. 203. *See "Release," Dec. Dig. (Key-No.) § 28; Cent. Dig. §§ 57–62.*

[28] Clayton v. Kynaston, 2 Salk. 573; Shed v. Pierce, 17 Mass. 628; Couch v. Mills, 21 Wend. (N. Y.) 424; Walker v. McCulloch, 4 Greenl. (Me.) 421; McLellan v. Bank, 24 Me. 566; Rowley v. Stoddard, 7 Johns. (N. Y.) 207. *See "Release," Dec. Dig. (Key-No.) § 28; Cent. Dig. §§ 57–62.*

[29] Eccleston v. Clipsham, 1 Wms. Saund. 153; Hatsall v. Griffith, 2 Cromp. & M. 679; Pease v. Hirst, 10 Barn. & C. 122; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Gould v. Gould, 6 Wend. (N. Y.) 263; Hewes v. Bayley, 20 Pick. (Mass.) 96; Archer v. Bogue, 3 Scam. (Ill.) 526; Wilson v. Wallace, 8 Serg. & R. (Pa.) 53; Slaughter v. Davenport, 151 Mo. 26, 51 S. W. 471. See, also, Clark v. Great Northern R. Co. (C. C.) 81 Fed. 282. *See "Contracts," Dec. Dig. (Key-No.) § 330; Cent. Dig. §§ 1589–1604.*

[30] Wetherell v. Langston, 1 Exch. 634; Angus v. Robinson, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758; Whart. Cont. 814. *See "Contracts," Dec. Dig. (Key-No.) § 330; Cent. Dig. §§ 1589–1604.*

[31] If one of the joint promisees is omitted, and the defect appears upon the record, it may be objected to by demurrer, or by motion in arrest of judgment, or by error. Petrie v. Bury, 3 Barn. & C. 353; Pugh v. Stringfield, 3

Same—Survivorship

Where one of several joint promisees dies, the legal right under the contract devolves upon the survivors, and they only can sue on the contract. The representative of the deceased promisee cannot be joined, nor can he sue alone.[32]

Same—Release

A payment of the debt to one of several joint promisees is a discharge of the debt. So, also, one of the promisees, without the others joining, may give a valid release of the debt, and it will bind the others.[32]

SAME—SEVERAL CONTRACTS

205. If two or more parties bind themselves severally to another in respect of the same matter or debt, their liability is separate and distinct, and they cannot be sued jointly.

206. If one party binds himself to several parties severally, their right to enforce the promise is separate.

On the other hand, several persons may bind themselves severally to another in respect of the same matter or debt, so that

C. B. (N. S.) 2; Wetherell v. Langston, 1 Exch. 634; Ehle v. Purdy, 6 Wend. (N. Y.) 629; Baker v. Jewell, 6 Mass. 460, 4 Am. Dec. 162; Beach v. Hotchkiss, 2 Conn. 697; Wiggin v. Cumings, 8 Allen (Mass.) 353. If the defect does not appear upon the record, there would be a variance between the contract as pleaded and proved, which, unless amended, would be fatal. Jell v. Douglas, 2 B. & Ald. 374; Chanter v. Leese, 4 Mees. & W. 295; Hallett v. Gordon, 122 Mich. 567, 81 N. W. 556, 82 N. W. 827. *See "Parties," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 123–131, 170.*

[32] Martin v. Crump, 2 Salk. 444; Anderson v. Martindale, 1 East, 497; Peters v. Davis, 7 Mass. 257; Murray v. Mumford, 6 Cow. (N. Y.) 441; Supreme Lodge Knights and Ladies of Honor v. Portingall, 167 Ill. 291, 47 N. E. 203, 59 Am. St. Rep. 296; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

[33] Rawstorne v. Gandell, 15 Mees. & W. 304; Wilkinson v. Lindo, 7 Mees. & W. 81; Myrick v. Dame, 9 Cush. (Mass.) 248; Tuckerman v. Newhall, 17 Mass. 581; Bruen v. Marquard, 17 Johns. (N. Y.) 58; Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Napier v. McLeod, 9 Wend. (N. Y.) 120; Osborn v. Martha's Vineyard R., 140 Mass. 549, 5 N. E. 486; Moore v. Bevier, 60 Minn. 240, 62 N. W. 281. Where a partner in a firm doing business in the state, to which a citizen of the state was indebted, was a nonresident, a discharge of the debtor in insolvency by a court of the state, since it did not affect the rights of the nonresident, did not discharge the debt. Chase v. Henry, 166 Mass. 577, 44 N. E. 988, 55 Am. St. Rep. 423. *See "Payment," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 7; "Release," Dec. Dig. (Key-No.) § 4; Cent. Dig. § 1.*

the creditor is entitled to claim the whole debt or performance against each debtor separately.[34] In such case the promisors must be sued separately; they cannot be sued jointly.[35] Where the promisors are severally liable, and therefore, of course, where they are both jointly and severally liable, a judgment against less than all of them does not discharge the others until it has been satisfied.[36] Again, one person may bind himself to each of several persons, provided the interest of each in the subject-matter of the promise is several, so that each promisee is separately entitled to sue thereon.[37]

Survivorship

The doctrine of survivorship applicable to joint contracts does not apply to several contracts.[38]

SAME—CONTRACTS BOTH JOINT AND SEVERAL

207. Where a contract in respect of the promisors is both joint and several,

(a) The promisee may sue all the promisors jointly, or each one separately.

(b) If he sues jointly, he must sue all the promisors; he cannot sue less than all jointly.

[34] Lurton v. Gilliam, 1 Scam. (Ill.) 577, 33 Am. Dec. 430. *See "Contracts," Dec. Dig. (Key-No.) § 183; Cent. Dig. §§ 780–788.*

[35] Davis v. Belford, 70 Mich. 120, 37 N. W. 919; Price v. Railroad Co., 18 Ind. 137; Sims v. Clark, 91 Ga. 302, 18 S. E. 158; Streator v. Paxton, 201 Pa. 135, 50 Atl. 926. This is changed by statute in most states. See Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302; Wibaux v. Live-Stock Co., 9 Mont. 154, 22 Pac. 492; Brown v. McKee, 108 N. C. 387, 13 S. E. 8; Wallis v. Carpenter, 13 Allen (Mass.) 19; Costigan v. Lunt, 104 Mass. 217. *See "Contracts," Dec. Dig. (Key-No.) § 183; Cent. Dig. §§ 780–788.*

[36] Ward v. Johnson, 13 Mass. 148; Harlan v. Berry, 4 G. Greene (Iowa) 212. *See "Contracts," Dec. Dig. (Key-No.) § 183; Cent. Dig. §§ 780–788.*

[37] Keightley v. Watson, 3 Ex. 716; Rorabacher v. Lee, 16 Mich. 169; Hall v. Leigh, 8 Cranch, 50, 3 L. Ed. 484; Chanter v. Leese, 4 Mees. & W. 295; Geer v. School Dist., 6 Vt. 76; Catawissa R. Co. v. Titus, 49 Pa. 277; Yates v. Foot, 12 Johns. (N. Y.) 1; Burton v. Henry, 90 Ala. 281, 7 South. 925; Emmeluth v. Home Benefit Ass'n, 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704; Shipman v. Straitsville Cent. Min. Co., 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015. *See "Contracts," Dec. Dig. (Key-No.) § 183; Cent. Dig. §§ 780–788.*

[38] Enys v. Donnithorne, 2 Burrows, 1190; Carthrae v. Brown, 3 Leigh (Va.) 98, 23 Am. Dec. 255. *See "Contracts," Dec. Dig. (Key-No.) § 183; Cent. Dig. §§ 780–788.*

Again, several persons may concurrently contract respecting the same matter, binding themselves jointly and also severally.[39]

Where the promise is both joint and several, the promisee may, at his election, either sue all the promisors jointly, or each one of them separately.[40] But he must do one or the other. He cannot sue less than all of them jointly. If, for example, there are three promisors, he cannot join two.[41]

A promise cannot be so made in respect of one and the same matter as to entitle several persons under it both jointly and severally. They must either be entitled under it jointly only, or severally only.[42]

Survivorship

As we have seen, the doctrine of survivorship does not apply to several contracts. It necessarily follows that it does not apply to joint and several contracts.

SAME—CONTRIBUTION BETWEEN JOINT DEBTORS

208. Where one of several joint debtors pays the whole debt, he may, in the absence of an agreement to the contrary, enforce contribution from the others; that is, he may recover from them their proportionate share of the debt.

The rights and liabilities of persons who have contracted jointly or severally respecting the same matter as between themselves depend upon the relation in which they stand, and the agreement or understanding upon which they have joined in the contract. In general the contract itself is independent of such relation or agreement. In contracts of guaranty or suretyship, for instance, made between the creditor and the principal debtor and his sureties, the principal debtor and the sureties are usually all made debtors in equal degree

[39] Leake, Cont. 217; Beecham v. Smith, El., Bl. & El. 442; Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27; Klapp v. Kleckner, 3 Watts & S. (Pa.) 519. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

[40] Schilling v. Black, 49 Kan. 552, 31 Pac. 143; Carter v. Carter, 2 Day (Conn.) 442, 2 Am. Dec. 113. A judgment against all is not a bar to an action against each. People v. Harrison, 82 Ill. 84; Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815. Contra, United States v. Price, 9 How. 83, 13 L. Ed. 56. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

[41] PRESIDENT, ETC., OF BANGOR BANK v. TREAT, 6 Greenl. (Me.) 207, 19 Am. Dec. 210, Throckmorton Cas. Contracts, 335; State v. Chandler, 79 Me. 172, 8 Atl. 553. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789*

[42] Slingsby's Case, 5 Coke, 18b; Anderson v. Martindale, 1 East, 497; Bradburne v. Botfield, 14 Mees. & W. 573; Eveleth v. Sawyer, 96 Me. 227, 52 Atl 639. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

to the creditor, who may recover the whole debt against all or any of them. As between themselves, however, the principal debtor is solely liable; and, if the surety is called upon by the creditor to pay any part of the debt, he may, upon payment, recover the amount from the principal debtor.[43] So, where there are several sureties, who are all primarily liable for the whole debt to the creditor, and one of them is called upon to pay, each of the cosureties becomes ratably indebted to him for contribution.[44] This rule is not limited to contribution between sureties, but applies to joint contractors generally. Where one of them is compelled to pay the whole debt, the law creates a promise on the part of the others to pay him their proportion, and he may sue them thereon.[45] The liability is quasi contractual. This doctrine of contribution applies where the contract is joint, or both joint and several, but not where it is several only. Formerly the right to contribution could only be enforced in equity, but now, except as between sureties, it may be enforced at law, as well as in equity. In some jurisdictions contribution between sureties can still be enforced in equity only, except where a statute provides otherwise.[46]

The principal contract may in some cases be affected by the rights and relations of the several parties who join in it. For instance, in contracts of guaranty or suretyship, the creditor is bound, upon principles of equity, to abstain from any dealing with the debtor which may prejudice the surety. If he binds himself to give further time to the debtor, without the consent of the surety, the latter is discharged.[47]

[43] Post, p. 628, note 22.

[44] Post, p. 628. The quasi contract for contribution is several and not joint. A surety therefor may enforce contribution against the estate of a deceased cosurety. Bachelder v. Fiske, 17 Mass. 464; Handley v. Heflin, 84 Ala. 600, 4 South. 725. *See "Contribution," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 3, 4; "Principal and Surety," Dec. Dig. (Key-No.) §§ 194–196; Cent. Dig. §§ 605–631.*

[45] Doremus v. Selden, 19 Johns. (N. Y.) 213; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547; Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497; Jeffries v. Ferguson, 87 Mo. 244; Foster v. Burton, 62 Vt. 239, 20 Atl. 326; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877. *See "Contribution," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 3, 4.*

[46] Longley v. Griggs, 10 Pick. (Mass.) 121; McDonald v. Magruder, 8 Pet. 470, 7 L. Ed. 744. *See "Contribution," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 14–22.*

[47] Rees v. Berrington, 2 Ves. Jr. 540; Pooley v. Harradine, 7 El. & Bl. 431; Gordon v. Bank, 144 U. S. 97, 12 Sup. Ct. 657, 36 L. Ed. 360; Chemical Co. of Canton v. Pegram, 112 N. C. 614, 17 S. E. 298; Durbin v. Kuney, 19 Or. 71, 23 Pac. 661. *See "Contribution," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 3, 4.*

CHAPTER X

INTERPRETATION OF CONTRACT

209–213. Rules Relating to Evidence—In General—Parol Evidence.
214–215. Proof of Document.
216. Evidence as to Fact of Agreement.
217. Evidence as to Terms of Contract.
218–220. Rules of Construction—General Rules.
221. Rules as to Time.
222–223. Rules as to Penalties and Liquidated Damages.
224. Joint and Several Contracts.

We have next to consider the mode in which the courts deal with a contract when it comes before them in litigation, or the interpretation of contracts. In considering this question we have to learn how the existence and the terms of a contract are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; and what rules have been adopted for construing the meaning of the terms when fully before the court. The subject, therefore, divides itself into (1) rules relating to evidence, and (2) rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.[1]

RULES RELATING TO EVIDENCE—IN GENERAL—PAROL EVIDENCE[2]

209. The circumstances under which an alleged contract by word of mouth was made, what was said and done by the parties, and their intention to contract, are questions of fact for the jury. Whether what was said and done amounts to a contract, and its effect, are questions of law for the court.

210. Where a man is proved to have made a contract by word of mouth upon certain terms, he cannot say he did not mean what he said.

211. A contract, or portion thereof, reduced to writing, cannot be altered by parol evidence.

[1] Anson, Cont. (4th Ed.) 237.
[2] Following substantially Anson, Cont. (4th Ed.) 238–240.

212. If a contract is under seal, the instrument itself is the contract, and its proof proves the contract.

213. A writing not under seal, whether required by the statute of frauds or not, is not itself the contract, but only evidence of the contract, so that a simple contract may have to be proved by writing, or by proof of words or acts, or partly by one and partly by the other.

If a dispute arises as to the terms of a contract made by word of mouth or by acts, or partly by both, it is necessary, in the first instance, to ascertain what was said or done, and the circumstances under which the supposed contract was formed. These are questions of fact to be determined by the jury from the evidence adduced before them. When a jury has found, as a matter of fact, what the parties said and did, and that they intended to enter into a contract, it is for the court to say whether what they have said or done amounts to a contract, and what is its effect.

When a person is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to say that he did not mean what he said. The law imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words; and not only of his words, but of his actions as well; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that agreement is established in law as a fact by proof of that conduct, whatever may be the real but unexpressed state of his mind on the matter.

The principle above stated applies also to contracts made in writing. Where parties have put into writing any portion of the terms of their agreement, they cannot alter by parol evidence that which is written; and, where the writing purports to be the whole of the agreement, it can neither be added to nor varied by parol evidence of their unexpressed intention.

It is not necessary for us to discuss the rules of evidence as regards purely oral contracts, for proof of a contract made by word of mouth is a part of the general law of evidence. Our consideration of the rules of evidence will therefore be confined to their effect upon written contracts and contracts under seal.

Admissible evidence extrinsic to such contracts falls under three heads: (1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract. (2) Evidence that the professed contract is in fact what it professes to be. It may lack some element necessary to the formation of contract, or be

subject to some parol condition upon which its existence as a contract depends. (3) Evidence as to the terms of the contract. These may require illustration which necessitates some extrinsic evidence; or they may be ambiguous, and then may be in like manner explained; or they may comprise, unexpressed, a custom or usage the nature and effect of which have to be proved.

Difference between Formal and Simple Contracts

Before taking up these questions as to the admissibility of evidence it will be well to note the difference between contracts under seal and simple contracts in writing, as illustrated by the rules of evidence respecting them. A contract under seal, as we have seen, derives its validity from the form in which it finds expression; therefore, if the instrument is proved, the contract is proved, unless it can be shown to have been executed under such circumstances as preclude the formation of contract, or to have been delivered to a third person under conditions which have remained unfulfilled, so that the deed is no more than an escrow. A written contract not under seal, however, is not the contract itself, but only evidence of the contract,—a record of the contract.[3] Even where statutory requirements for writing exist, as under the statute of frauds, the writing is nothing more than evidence of the agreement. A written offer containing all the terms of the contract, signed by the proposer, and accepted by the other party by performance on his part, is enough to enable the latter to sue under the statute of frauds. And where there is no such necessity for writing, it is optional with the parties to express their agreement by word of mouth, by action, or by writing, or partly by one and partly by another of these processes. It is always possible, therefore, that a simple contract may have to be sought for in the words and acts, as well as in the writing, of the contracting parties. But in so far as they have reduced their meaning to writing they cannot adduce evidence in contradiction or alteration of it. They put on paper what is to bind them, and so make the written document conclusive evidence against them.[4]

[3] Wake v. Harrop, 6 Hurl. & N. 768. *See "Contracts," Dec. Dig. (Key-No.) § 30; Cent. Dig. § 144.*

[4] Id. *See "Contracts," Dec. Dig. (Key-No.) § 30; Cent. Dig. § 144; "Evidence," Dec. Dig. (Key-No.) §§ 384, 385; Cent. Dig. §§ 1757, 1758.*

SAME—PROOF OF DOCUMENT

214. A contract under seal is proved by evidence of the sealing and delivery.

215. In proving a simple contract evidenced by a document, parol evidence is admissible for the following purposes:

(a) To show that the defendant is the person who made the contract.

(b) To supplement the writing where it only constitutes a part of the contract.

(c) To connect several documents which together show the contract, except—

EXCEPTION—Where the contract is within the statute of frauds.

Contracts under Seal

A contract under seal is proved by evidence of the sealing and delivery. At common law it is necessary to call one of the attesting witnesses where a contract under seal is attested;[5] but by statute in many jurisdictions this is no longer necessary. Where the attesting witnesses are dead, or without the jurisdiction of the court, or are for any other reason incapable of testifying, the sealing and delivery of the deed is sufficiently shown by proof of their handwriting.[6] In a number of states it has been considered that proof of the handwriting of the grantor or obligor furnishes more satisfactory evidence of its execution than proof of the handwriting of the subscribing witness, and such proof has been held sufficient, except in the case of instruments which the law requires to be attested by witnesses.[7]

[5] Burke v. Miller, 7 Cush. (Mass.) 547; Henry v. Bishop, 2 Wend. (N. Y.) 575; Jackson v. Gager, 5 Cow. (N. Y.) 383; Hess v. Griggs, 43 Mich. 397, 5 N. W. 427; McAdams' Ex'rs v. Stilwell, 13 Pa. 90; Brigham v. Palmer, 3 Allen (Mass.) 450; Melcher v. Flanders, 40 N. H. 139; Jackson v. Sheldon, 22 Me. 569; Dorr v. School Dist., 40 Ark. 237. *See "Evidence," Dec. Dig. (Key-No.) §§ 370, 374; Cent. Dig. §§ 1538, 1559–1578, 1584.*

[6] Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Beattie v. Hilliard, 55 N. H. 428; Davis v. Higgins, 91 N. C. 382; Richards v. Skiff, 8 Ohio St. 586; Elliott v. Dycke, 78 Ala. 150; Troeder v. Hyams, 153 Mass. 536, 27 N. E. 775; Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641. *See "Evidence," Dec. Dig. (Key-No.) § 374; Cent. Dig. §§ 1583–1612.*

[7] Newsom v. Luster, 13 Ill. 175; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Woodman v. Segar, 25 Me. 90; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Landers v. Bolton, 26 Cal. 393. *See "Evidence," Dec. Dig. (Key-No.) § 375; Cent. Dig. §§ 1591–1606.*

Simple Contracts

In proving a simple contract, whether in writing or not, parol evidence is always necessary to show that the party sued is the party who made the contract and is bound by it. In no other way could this be shown.

Oral evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance, if a person writes another that he will give the latter a certain sum for an article, and tells him to ship it if he accepts the offer, parol evidence of the shipment would be necessary to prove conclusion of the contract. And so, if a person puts the terms of an agreement into a written offer which the other party accepts by word of mouth, or if, where no writing is necessary, he puts part of the terms into writing, and arranges the rest by parol with the other party, oral evidence must be given in both cases to show that the contract was concluded upon those terms by the acceptance of the other party.[8]

If the contract is signed by an attesting witness, it has been said that "so long as the evidence of the subscribing witness can be produced, it is the best—the primary and only—evidence of execution." [9]

So, also, where the evidence of a contract consists of several documents which do not on their face show their connection with each other, parol evidence is admissible to show their connection,[10] except in the case of contracts which the statute of frauds requires to be expressed in writing.[11]

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but this is a part of the general law of evidence.

[8] Harris v. Rickett, 4 Hurl. & N. 1. *See "Evidence," Dec. Dig. (Key-No.) § 417; Cent. Dig. §§ 1874–1899.*

[9] RICHMOND & D. R. CO. v. JONES, 92 Ala. 218, 9 South. 276, Throckmorton Cas. Contracts, 337, per Coleman, J. *See "Evidence," Dec. Dig. (Key-No.) § 374; Cent. Dig. §§ 1583–1612.*

[10] Edwards v. Insurance Soc., 1 Q. B. Div. 563; Bergin v. Williams, 138 Mass. 544; Barney v. Forbes, 118 N. Y. 580, 23 N. E. 890; Blake v. Coleman, 22 Wis. 415, 99 Am. Dec. 53; Beer v. Aultman-Taylor Co., 32 Minn. 90, 19 N. W. 388; Myers v. Munson, 65 Iowa, 423, 21 N. W. 759; Colby v. Dearborn, 59 N. H. 326. *See "Evidence," Dec. Dig. (Key-No.) § 416; Cent. Dig. §§ 1903–1905.*

[11] Ante, p. 109.

SAME—EVIDENCE AS TO FACT OF AGREEMENT [12]

216. A document having been proved, parol evidence is admissible to show that it is not in fact a valid agreement.

Thus far we have dealt with the mode of bringing a document purporting to be an agreement, or part of an agreement, before the court. Parol evidence is always admissible to show that the document is not in fact a valid agreement. It may be shown, for instance, that incapacity of one of the parties, want of genuine consent because of mistake, fraud, etc.,[13] or illegality of object,[14] made the agreement of the parties unreal, or such as the law forbids to be carried out. In case of a simple contract, it may be shown, where the promise only appears in writing, that no consideration was given for the promise.[15] In case of a deed,

[12] Following substantially Anson, Cont. (4th Ed.) 241–243.

[13] Grand Tower & C. G. R. Co. v. Walton, 150 Ill. 428, 37 N. E. 920; Ewing v. Wilson, 132 Ind. 223, 31 N. E. 65, 19 L. R. A. 767; Cooper v. Finke, 38 Minn. 2, 35 N. W. 469; Anderson v. Walter, 34 Mich. 113; Wanner v. Landis, 137 Pa. 61, 20 Atl. 950; Universal Fashion Co. v. Skinner, 64 Hun, 293, 19 N. Y. Supp. 62; Kranich v. Sherwood, 92 Mich. 397, 52 N. W. 741; Scroggin v. Wood, 87 Iowa, 497, 54 N. W. 437; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Marston v. Insurance Co., 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412; ante, p. 244. *See "Evidence," Dec. Dig. (Key-No.) §§ 428–437; Cent. Dig. §§ 1973–2020.*

[14] Allen v. Hawks, 13 Pick. (Mass.) 79; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; Buffendeau v. Brooks, 28 Cal. 642; Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152; Totten v. U. S., 92 U. S. 105, 23 L. Ed. 605; New England Mortg. Security Co. v. Gay (C. C.) 33 Fed. 636; Lewis v. Willoughby, 43 Minn. 307, 45 N. W. 439; Benicia Agricultural Works v. Estes, 3 Cal. Unrep. 855, 32 Pac. 938; ante, p. 314. *See "Evidence," Dec. Dig. (Key-No.) §§ 433–437; Cent. Dig. §§ 1990–2020.*

[15] As to the conclusiveness of the recital of consideration in a written contract or conveyance, there has been a great deal of conflict. The New York court held in a leading case that the consideration clause in a conveyance is only prima facie evidence of a consideration, except for the purpose of giving effect to the operative words of the conveyance, and that to that end alone is it conclusive. The rule, it seems, applies to all written contracts, and is the prevailing doctrine in this country. McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103. See Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Rhine v. Ellen, 36 Cal. 362; Miller v. Edgerton, 88 Kan. 36, 15 Pac. 894; Nichols, Shepard & Co. v. Burch, 128 Ind. 324, 27 N. E. 737; Barbee v. Barbee, 108 N. C. 581, 13 S. E. 215; Id., 109 N. C. 299, 13 S. E. 792; Mobile Sav. Bank v. McDonnell, 89 Ala. 434, 8 South. 137, 9 L. R. A. 645, 18 Am. St. Rep. 137; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336; Halpin v. Stone, 78 Wis. 183, 47 N. W. 177; Louisville, St. L. & T. R. Co. v. Neafus, 93 Ky. 53, 18 S. W. 1030; Hall v. Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; Silvers

want of consideration cannot ordinarily be shown, because its validity does not depend on consideration, but on its form; but, where fraud or undue influence is alleged against the validity of the deed, the absence or inadequacy of consideration may be shown in corroboration of other evidence tending to sustain the allegation.

Apart from such circumstances as these, it is permissible to prove a parol condition suspending the operation of the contract; and this applies both to deeds and simple contracts. A deed, for instance, may be shown to have been signed, or to have been delivered to a third person subject to the happening of an event or the doing of an act. In the latter case, until the event happens, or the act is done, the deed remains an escrow, and the terms upon which it was delivered may be proved by extrinsic evidence; but, as we have seen, this cannot be where the deed is delivered to the other party himself.[16]

So, also, with simple contracts in writing. Evidence may be given to the effect that a document purporting to be a contract is not so in fact. It may be dependent upon a condition not expressed in the document, so that, until the condition happens, the parties agree that the written contract is to remain inoperative. In a case involving this point, the law was stated as follows: "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and if, in fact, he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence. But in the present case the defense begins one step earlier. The parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be set up without ground, * * * but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon

v. Potters, 48 N. J. Eq. 539, 22 Atl. 584; Hill v. Whidden, 158 Mass. 267, 33 N. E. 526; Bristol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265. *See "Evidence," Dec. Dig. (Key-No.) §§ 433–437; Cent. Dig. §§ 1990–2020.*

[16] Ante, p. 67; Richards v. Day, 63 Hun, 635, 18 N. Y. Supp. 733; Haworth v. Norris, 28 Fla. 763, 10 South. 18; Gregory v. Littlejohn, 25 Neb. 368, 41 N. W. 253; note 19, infra. Proof that parties who signed a bond did so on condition that other persons named therein as sureties would also sign it is competent to show that it was never completely executed. State v. Wallis, 57 Ark. 64, 20 S. W. 811. *See "Evidence," Dec. Dig. (Key-No.) §§ 420, 444; Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1929–1944.*

those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." [17]

SAME—EVIDENCE AS TO TERMS OF CONTRACT [18]

217. Parol evidence as to the terms of a contract which appears to be complete in writing is inadmissible, except

(a) To prove terms which are supplementary or collateral to so much of the agreement as is in writing.

(b) To explain terms of the contract which need explanation.

(c) To introduce a custom or usage into the contract.

(d) In the application by courts of equity of their peculiar remedies in cases of mistake.

Where a contract is reduced to writing, it is presumed to embody the final and entire agreement of the parties; and parol evidence is accordingly inadmissible to contradict, add to, or otherwise vary, the written contract.[19] So, where a written contract

[17] Pym v. Campbell, 6 El. & Bl. 370. And see McFarland v. Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; Wilson v. Powers, 131 Mass. 539; Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; Juilliard v. Chaffee, 92 N. Y. 529; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255; Lipscomb v. Lipscomb, 32 S. C. 243, 10 S. E. 929; Solenberger v. Gilbert's Adm'r, 86 Va. 778, 11 S. E. 789; Humphreys v. Railroad Co., 88 Va. 431, 13 S. E. 985; Gibbons v. Ellis, 83 Wis. 434, 53 N. W. 701; Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600; Burns & Smith Lumber Co. v. Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; Hillyard v. Hewitt, 61 Or. 58, 120 Pac. 750. This rule, in the absence of fraud, does not permit parol evidence of an agreement contemporaneous with a written contract, such as a note or bond, which has been completely executed and finally delivered, so as to take effect, that the obligee or promisee would not enforce the contract, or that the liability of the obligor or promisor should be dependent upon a condition not expressed in the writing. See note 18, infra. *See "Evidence," Dec. Dig. (Key-No.) § 397; Cent. Dig. §§ 1756–1765.*

[18] Anson, Cont. (4th Ed.) 243–251.

[19] SMITH v. WILLIAMS, 5 N. C. 426, 4 Am. Dec. 564, Throckmorton Cas. Contracts, 339; Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Pierce v. Tidwell, 81 Ala. 299, 2 South. 15; Atlee v. Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103; Bofinger v. Tuyes, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. Ed. 649; De Long v. Lee, 73 Iowa, 53, 34 N. W. 613; Gilbert v. Plow Co., 119 U. S. 491, 7 Sup. Ct. 305, 30 L. Ed. 476; Williams v. Kent, 67 Md. 350, 10 Atl. 228; Conant v. Bank, 121 Ind. 323, 22 N. E. 250; Merchants' & Farmers' Nat. Bank v. McElwee, 104 N. C. 305, 10 S. E. 295; Harrow Spring Co. v. Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep.

has been fully executed and delivered, parol evidence is not admissible of an understanding that it should not be operative according to its terms, or that the liability of the promisor, absolute on the face of the instrument, was intended to be conditional.[20] And parol testimony is also inadmissible to contradict an implied term of a contract, or to alter its legal effect.[21] Notwithstanding the strictness, however, with which the parol evidence rule is enforced by the courts, parol testimony affecting the terms of a written contract is admissible when the effect of such testimony is not to vary, but to explain, the contract, or to add a term to a contract in writing which is evidently not intended to cover the entire agreement between the parties.[22]

421; Gasper v. Heimbach, 53 Minn. 414, 55 N. W. 559; Violette v. Rice, 173 Mass. 82, 53 N. E. 144; Clark v. Mallory, 185 Ill. 227, 56 N. E. 1099; Smith v. Bank, 89 Fed. 832, 32 C. C. A. 368. The rule excluding parol evidence is confined to the parties to the contract, or their privies; and it does not apply as between a party and a stranger. Clapp v. Banking Co., 50 Ohio St. 528, 35 N. E. 308; Highstone v. Burdette, 61 Mich. 54, 27 N. W. 852; Bruce v. Lumber Co., 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657; Fonda v. Burton, 63 Vt. 355, 22 Atl. 594; Grove v. Rentch, 26 Md. 367; Clerihew v. Bank, 50 Minn. 538, 52 N. W. 967; First Nat. Bank v. Dunn, 55 N. J. Law, 404, 27 Atl. 908; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386. Where part of the contract is in writing and part is oral, that part which has been reduced to writing may not be contradicted by parol evidence. English v. New Orleans & N. E. R. Co., 100 Miss. 809, 57 South. 223. *See "Evidence," Dec. Dig. (Key-No.) § 397; Cent. Dig. §§ 1756–1765.*

[20] McCormick Harvesting Mach. Co. v. Wilson, 39 Minn. 467, 40 N. W. 571; Marquis v. Lauretson, 76 Iowa, 23, 40 N. W. 73; Meekins v. Newberry, 101 N. C. 17, 7 S. E. 655; Thompson v. McKee, 5 Dak. 172, 37 N. W. 367; Coapstick v. Bosworth, 121 Ind. 6, 22 N. E. 772; Dexter v. Ohlander, 93 Ala. 441, 9 South. 361; Engelhorn v. Reitlinger, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; Ziegler v. McFarland, 147 Pa. 607, 23 Atl. 1045; Osborne v. Taylor, 58 Conn. 439, 20 Atl. 605; Harrison v. Morrison, 39 Minn. 319, 40 N. W. 66; Burns & Smith Lumber Co. v. Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235. Cf. Clinch Valley Coal & Iron Co. v. Willing, 180 Pa. 165, 36 Atl. 737, 57 Am. St. Rep. 626. In the absence of fraud, parol evidence is not admissible to show that the obligee, contemporaneously with the execution of a bond, promised not to enforce it as against one of the parties. Towner v. Lucas' Ex'r, 13 Grat. (Va.) 705; Barnett v. Barnett, 83 Va. 504, 2 S. E. 733; Yeager v. Yeager (Pa.) 8 Atl. 579. *See "Evidence," Dec. Dig. (Key-No.) § 420; Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929–1944.*

[21] Barry v. Ransom, 12 N. Y. 464; In re Clairfield Lumber Co. (D. C.) 194 Fed. 181, 194; Van Winkle & Co. v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880. *See "Evidence," Dec. Dig. (Key-No.) §§ 423, 441; Cent. Dig. §§ 1957–1965, 2030–2047.*

[22] See infra, notes 23, 24. Where a parol contract is executed, the subsequent reduction of the contract to writing does not prevent one of the parties from proving by parol a term of the original contract not included in the writing. Smith v. Hunt, 50 Ind. App. 592, 98 N. E. 841. *See "Evidence," Dec. Dig. (Key-No.) § 417; Cent. Dig. §§ 1874–1899.*

Proof of Supplementary or Collateral Terms

If the parties to a contract have not put all its terms in writing, parol evidence of the supplementary terms is admissible, not to vary, but to complete, the written contract.[23] Thus, where a written contract for the sale of goods mentions the price, but is silent as to the terms of payment, the terms may be shown by parol evidence.[24] And a subsequent agreement changing the terms of a written contract may be shown by parol evidence.[25]

Again, evidence may be given of an oral agreement collateral to the written contract, subjecting it to a term unexpressed in its contents; but such a term cannot be enforced if it is contrary to the tenor of the writing.[26] "No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a 'collateral agreement,' where the parties have entered into an agreement for a lease, or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation

[23] Jervis v. Berridge, 8 Ch. App. 351; Potter v. Hopkins, 25 Wend. (N. Y.) 417; Batterman v. Pierce, 3 Hill (N. Y.) 171; Grierson v. Mason, 60 N. Y. 394; Holt v. Pie, 120 Pa. 425, 14 Atl. 389; Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Reynolds v. Hassam, 56 Vt. 449; Coates v. Sangston, 5 Md. 121; Walter A. Wood Mach. Co. v. Gaertner, 55 Mich. 453, 21 N. W. 885; Lash v. Parlin, 78 Mo. 391; Bretto v. Levine, 50 Minn. 168, 52 N. W. 525; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Peabody v. Bement, 79 Mich. 47, 44 N. W. 416; Bank v. Cooper, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759. *See "Evidence," Dec. Dig. (Key-No.) § 441; Cent. Dig. §§ 1723–1763.*

[24] Paul v. Owings, 32 Md. 402; Magill v. Stoddard, 70 Wis. 75, 35 N. W. 346. Where a contract specifies no time, parol evidence of a contemporaneous agreement as to time of payment is admissible. Horner v. Horner, 145 Pa. 258, 23 Atl. 441; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571. *See "Evidence," Dec. Dig. (Key-No.) § 441; Cent. Dig. §§ 1723–1763; "Sales," Cent. Dig. § 721.*

[25] Coe v. Hobby, 72 N. Y. 141, 147, 28 Am. Rep. 120; Kennebec Co. v. Augusta Ins. & B. Co., 6 Gray (Mass.) 204; Quigley v. De Haas, 98 Pa. 292; Smith v. Lilley, 17 R. I. 119, 20 Atl. 227; Stallings v. Gottschalk, 77 Md. 429, 26 Atl. 524; Bannon v. Aultman, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37; Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673. *See "Evidence," Dec. Dig. (Key-No.) § 445; Cent. Dig. §§ 2052–2065.*

[26] Lindley v. Lacy, 17 C. B. (N. S.) 578; Ayer v. Manufacturing Co., 147 Mass. 46, 16 N. E. 754; Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Bonney v. Morrill, 57 Me. 368; Walker v. France, 112 Pa. 203, 5 Atl. 208; Roberts v. Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Palmer v. Roath, 86 Mich. 602, 49 N. W. 590; Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; Phœnix Pub. Co. v. Clothing Co., 54 Minn. 205, 55 N. W. 912; Keen v. Beckman, 66 Iowa, 672, 24 N. W. 270. *See "Evidence," Dec. Dig. (Key-No.) § 442; Cent. Dig. §§ 1874–1897.*

contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved." [27]

Explanation of Terms

Parol evidence is also admissible, where it is necessary in order to explain the terms of a written contract. Explanation of terms may merely amount to evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name, but on behalf of a principal whose name or whose existence he failed to disclose.[28] Or, again, it may be a description of the subject-matter of a contract that needs explanation. Where, for instance, persons agreed to buy from another certain wool, which was described as "your wool," and the right of the seller to introduce evidence of the quality and quantity of the wool was disputed, the evidence was held admissible.[29]

Again, it may be necessary to explain some word or clause in the writing, not describing the subject-matter of the contract, but

[27] Erskine v. Adeane, 8 Ch. App. 756. *See "Evidence," Dec. Dig. (Key-No.) § 441; Cent. Dig. §§ 1723–1763.*

[28] Wake v. Harrop, 6 Hurl. & N. 768; Darrow v. Produce Co. (C. C.) 57 Fed. 463; Mobberly v. Mobberly, 60 Md. 376; Hartzell v. Crumb, 90 Mo. 629, 3 S. W. 59; Simpson v. Dix, 131 Mass. 179; Martin v. Smith, 65 Miss. 1, 3 South. 33; Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; Barkley v. Tarrant, 20 S. C. 574, 47 Am. Rep. 853; Rumbough v. Southern Imp. Co., 106 N. C. 461, 11 S. E. 528; Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. 834; Bartlett v. Remington, 59 N. H. 364; Haskell v. Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96. The writing, however, cannot be contradicted as to the parties. Parol evidence, for instance, is not admissible to show that an order reading "Ship to me," and signed "G. G. Bauder," was intended to be the order of the firm of "George G. Bauder & Co." Osgood v. Bauder, 82 Iowa, 171, 47 N. W. 1001. An agent who contracts in his own name cannot, to escape liability, show that he intended to bind his principal and not himself. Higgins v. Senior, 8 Mees. & W. 834; Dexter v. Ohlander, 93 Ala. 441, 9 South. 361; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; Brigham v. Herrick, 173 Mass. 460, 53 N. E. 906; Tiffany, Ag. 234, 356. *See "Evidence," Dec. Dig. (Key-No.) § 448; Cent. Dig. §§ 2066–2082.*

[29] Macdonald v. Longbottom, 1 El. & El. 977. And see Bulkley v. Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Clark v. Coffin Co., 125 Ind. 277, 25 N. E. 288; Thompson v. Stewart, 60 Iowa, 223, 14 N. W. 247; Thornell v. City of Brockton, 141 Mass. 151, 6 N. E. 74; Busby v. Bush, 79 Tex. 656, 15 S. W. 638; Thacker v. Howell (Ky.) 26 S. W. 719; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680; Merriam v. United States, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; Reed v. Insurance Co., 95 U. S. 23, 24 L. Ed. 348; New England Dressed M. & W. Co. v. Standard W. Co., 165 Mass. 328, 43 N.

describing the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract. Where, for instance, a person accepted an order upon him by one who had contracted to do certain work for him, "to be paid out of the last installment," evidence was admitted to show that the meaning of the words quoted was that the order was only to be paid out of the last payment to a certain person provided for in the contract, and that, if that person did not fulfill his contract so that the last payment would become due and payable, there should be no liability on the order.[30] So, also, where a vessel is warranted "seaworthy," a house promised to be kept "in tenantable repair," or a thing undertaken to be done in a "reasonable manner," parol evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties. In every policy of marine insurance there is an implied warranty by the assured that the vessel is "seaworthy." In an action on such a policy, evidence was held admissible to show that the word "seaworthy" was understood in a modified sense with reference to the particular vessel and voyage.[31]

Cases of the sort we have just described are called cases of latent ambiguity, as distinguished from patent ambiguities, where words are omitted or contradict one another. In the latter cases explanatory evidence is not admissible. Thus, where a bill of exchange was drawn for one sum in words, and the figures at the top were for a larger amount, evidence was not admitted to show that the bill was intended to be drawn for the latter amount.[32]

E. 112, 52 Am. St. Rep. 516; Brown v. Markland, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629. *See "Evidence," Dec. Dig. (Key-No.) § 460; Cent. Dig. §§ 2115–2128.*

[30] Proctor v. Hartigan, 143 Mass. 462, 9 N. E. 841. And see Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 861; Wickes Bros. v. Electric Light Co., 70 Mich 322, 38 N. W. 299; Rhodes v. Wilson, 12 Colo. 65, 20 Pac. 746; Roberts v. Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044; Macdonald v. Dana, 154 Mass. 152, 27 N. E. 993; Fawkner v. Wall-Paper Co. (Iowa) 49 N. W. 1003; Hurd v. Bovee, 54 Hun, 635, 7 N. Y. Supp. 241; Id., 134 N. Y. 595, 31 N. E. 624; Durr v. Chase, 161 Mass. 40, 36 N. E. 741; Halladay v. Hess, 147 Ill. 588, 35 N. E. 380. *See "Evidence," Dec. Dig. (Key-No.) § 463; Cent. Dig. §§ 2140–2143.*

[31] Burges v. Wickham, 3 Best & S. 669. See Payne v. Haine, 16 Mees. & W. 541. *See "Evidence," Dec. Dig. (Key-No.) §§ 456, 457; Cent. Dig. §§ 2104–2106.*

[32] Sanderson v. Piper, 5 Bing. N. C. 425. *See "Evidence," Dec. Dig. (Key-No.) §§ 451, 452; Cent. Dig. §§ 2085–2101.*

Evidence of Custom and Usage

Evidence of the custom or usage of a trade, or of a particular locality, is admissible, though it may add a term to a contract, or may attach a special, and sometimes unnatural, meaning to one of the terms expressed.[33]

Same—To add a Term to the Contract

As an instance of a usage which annexes a term to a contract, we may cite the warranty of seaworthiness which by custom is always implied in a contract of marine insurance, though not specially mentioned. So, also, in a case of agricultural customs, a usage that the tenant, quitting his farm at Christmas, was entitled to reap grain sown the preceding autumn, was held in England to be annexed to his lease, though the lease was under seal, and was silent on the subject.[34]† And in a New York case it was held that, where a contract for excavating city lots was silent as to whom the sand and dirt taken out should belong to, a well-known custom by which it belonged to the excavator, and not to the owner of the lots, might be shown as evidence of the contract.[35]

The principle on which usages are so annexed has been said to rest on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." [36]

Same—To Explain Terms

Proof of custom and usage is also admissible to explain words and phrases in contracts, where they are commercial terms, or otherwise subject to known customs. The principle on which

[33] Wilcox v. Wood, 9 Wend. (N. Y.) 346; Rindskoff v. Barrett, 14 Iowa, 101; Potter v. Morland, 8 Cush. (Mass.) 384; Sampson v. Gazzan, 6 Port. (Ala.) 123, 30 Am. Dec. 578; Thompson v. Brannin, 94 Ky. 490, 21 S. W. 1057; Swift Iron Works v. Dewey, 37 Ohio St. 242; Steamboat Albatross v. Wayne, 16 Ohio, 513; Newhall v. Appleton, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859; Patterson v. Crowther, 70 Md. 124, 16 Atl. 531; Brown Chemical Co. v. Atkinson, 91 N. C. 389; McCullough v. Hellwig, 66 Md. 269, 7 Atl. 455; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Donovan v. Standard Oil Co., 155 N. Y. 112, 49 N. E. 678. *See "Customs and Usages," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 27, 28; "Evidence," Cent. Dig. §§ 1945–1952.*

[34] Wigglesworth v. Dollison, 1 Smith, Lead. Cas. 594. *See "Customs and Usages," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 27, 28; "Evidence," Cent. Dig. §§ 1945–1952.*

[35] COOPER v. KANE, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512, Throckmorton Cas. Contracts, 345. And see Hewitt v. Lumber Co., 77 Wis. 548, 46 N. W. 822. *See "Customs and Usages," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 27, 28; "Evidence," Cent. Dig. §§ 1945–1952.*

[36] Hutton v. Warren, 1 Mees. & W. 466; Appleman v. Fisher, 34 Md. 540.

ciently general to be obligatory on all persons in that city.[47] Even here, however, it would scarcely be binding on persons living at a distance, unless it were shown affirmatively that they knew of it.[48]

It is a general rule that the usage must have been known to the parties;[49] but, if a usage is established and is general, it is presumed to have been known to them, and is obligatory without affirmative proof of knowledge, and even in case of ignorance.[50] If it is not a general usage, then it must be affirmatively shown that the parties had knowledge of the usage, and contracted with reference to it.[51] In order that a usage may be binding, it must have been actually or presumptively known to both of the parties, and not merely to the party who is sought to be charged by it. Want of knowledge of a local usage on the part of one of them shows that it could not have entered into the contract.[52]

It is also essential that a usage shall be consistent with rules of law, for "a universal usage cannot be set up against the general

[47] Renner v. Bank, 9 Wheat. 587, 6 L. Ed. 166; Mills v. Bank, 11 Wheat. 431, 6 L. Ed. 512. *See "Customs and Usages," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 4.*

[48] German American Ins. Co. v. Commercial Fire Ins. Co., 95 Ala. 469, 11 South. 117, 16 L. R. A. 291; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; Simon v. Johnson, 101 Ala. 368, 13 South. 491. *See "Customs and Usages," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 4.*

[49] Bliven v. Screw Co., 23 How. 420, 16 L. Ed. 510; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Dawson v. Kittle, 4 Hill (N. Y.) 107; Martin v. Hall, 26 Mo. 386; Martin v. Maynard, 16 N. H. 165; Murray v. Brooks, 41 Iowa, 45; Sugart v. Mays, 54 Ga. 554; Janney v. Boyd, 30 Minn. 319, 15 N. W. 308; Scott v. Whitney, 41 Wis. 504; Dodge v. Favor, 15 Gray (Mass.) 82; Sawtelle v. Drew, 122 Mass. 228; Marshall v. Perry, 67 Me. 78. *See "Customs and Usages," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 23, 24.*

[50] Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Bailey v. Bensley, 87 Ill. 556; Blake v. Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103; Carter v. Coal Co., 77 Pa. 286; Ford v. Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297; Howard v. Walker, 92 Tenn. 452, 21 S. W. 897; Austrian v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568. *See "Customs and Usages," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 23, 24.*

[51] Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; Sleght v. Hartshorne, 2 Johns. (N. Y.) 532; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573; Pennell v. Transportation Co., 94 Mich. 247, 53 N. W. 1049; Brunnell v. Sawmill Co., 86 Wis. 587, 57 N. W. 364. *See "Customs and Usages," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 23, 24.*

[52] Nonotuck Silk Co. v. Fair, 112 Mass. 354; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510. *See "Customs and Usages," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 23, 24.*

law."[53] If it is inconsistent with any rule of the common law,[54] or with any statute,[55] or is contrary to public policy,[56] it cannot be recognized. A usage, however, is not contrary to rules of law in this sense, merely because it makes the law applicable to the particular contract different from what it would be if the usage were not imported into the contract. This is generally the object and the natural effect of proving a usage.

A usage cannot be set up to affect a contract if it is unreasonable or oppressive.[57] A usage of agents, for instance, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and, upon mere confidence in the good credit of the drawees, to take in exchange their checks upon banks, was held ineffectual because unreasonable.[58]

Finally, the usage must not be inconsistent with the terms of the contract, for it is optional with the parties to exclude the usage if

[53] Meyer v. Dremer, 11 C. B. (N. S.) 646. *See "Customs and Usages," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 8–10.*

[54] First Nat. Bank v. Taliaferro, 72 Md. 164, 19 Atl. 364; Dickinson v. Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; Hedden v. Roberts, 134 Mass. 38, 45 Am. Rep. 276; Tucker v. Smith, 68 Tex. 473, 3 S. W. 671; Inglebright v. Hammond, 19 Ohio, 637, 53 Am. Dec. 430; Globe Milling Co. v. Elevator Co., 44 Minn. 153, 46 N. W. 306; Marshall v. Perry, 67 Me. 78. *See "Customs and Usages," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 8–10.*

[55] Colgate v. Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114; Many v. Iron Co., 9 Paige (N. Y.) 188; Cayzer v. Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317; Cutter v. Howe, 122 Mass. 541; Mansfield v. Inhabitants, 15 Gray (Mass.) 149; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; McCrary v. McFarland, 93 Ind. 466. Proof of usage cannot give a different meaning to terms than that given by statute. Green v. Moffett, 22 Mo. 529; Rogers v. Allen, 47 N. H. 529. Nor can proof of usage change the statutory duties of an officer. Scribner v. Town of Hollis, 48 N. H. 30; Delaplane v. Crenshaw, 15 Grat. (Va.) 457; Frazier v. Warfield, 13 Md. 279. Nor can violation of usury laws be justified by usage. Gore v. Lewis, 109 N. C. 539, 13 S. E. 909; Dunham v. Gould, 16 Johns. (N. Y.) 367, 8 Am. Dec. 323; Greene v. Tyler, 39 Pa. 361. *See "Customs and Usages," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 8–10.*

[56] Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66. *See "Customs and Usages," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 8–10.*

[57] Seccomb v. Insurance Co., 10 Allen (Mass.) 305; Blackburn v. Mason, 4 Reports, 297, 68 Law T. 510; Minis v. Nelson (C. C.) 43 Fed. 777; Central R. Co. v. Anderson, 58 Ga. 393; Pennsylvania Coal Co. v. Sanderson, 94 Pa. 302, 39 Am. Rep. 785; Boardman v. Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Strong v. Railroad Co., 15 Mich. 206, 93 Am. Dec. 184; Anderson v. Whitaker, 97 Ala. 690, 11 South. 919; Nolte v. Hill, 36 Ohio St. 186; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125; Haskins v. Warren, 115 Mass. 514; Merchants' Ins. Co. v. Prince, 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626. *See "Customs and Usages," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[58] Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762. *See "Customs and Usages," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

they think fit, and to frame their contract so as to be repugnant to is operation.[59]

In Equity

In the application of equitable remedies, the granting or refusal of specific performance, the reformation of documents, or their rescission and cancellation, extrinsic evidence is much more freely admitted than at law. For instance, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted in good faith, evidence has been admitted to show that the offer was made by inadvertence. Thus, where a person, immediately after dispatching an offer to sell several plots of land for a round sum, discovered that by a mistake in adding up the prices of the plots he had offered them for less than he intended, and informed the other party of the mistake without delay, but not before the latter had concluded the contract by acceptance, the court allowed the mistake to be shown, and refused specific performance, leaving the person to whom the offer was made to such remedy by way of damages as he could obtain in the common-law courts.[60]

Again, where a parol contract has been reduced to writing, or where a contract for a sale or lease of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties; and this is done for two purposes, and under two sets of circumstances.

Where a contract has been reduced to writing, or a deed executed, in pursuance of a previous agreement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, a court of equity will rectify or reform the written instrument in accordance with their true intent; and this may be done even though the parties cannot be placed in the position they occupied

[59] Blackett v. Assurance Co., 2 Cromp. & J. 244; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Randolph v. Halden, 44 Iowa, 327; Greenstine v. Borchard, 50 Mich. 434, 15 N. W. 540, 45 Am. Rep. 51; Seavey v. Shurick, 110 Ind. 494, 11 N. E. 597; Wolff v. Campbell, 110 Mo. 114, 19 S. W. 622; O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269; Baltimore Baseball Club & Exhibition Co. v. Pickett, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; Holloway v. McNear, 81 Cal. 154, 22 Pac. 514; Gilbert v. McGinnis, 114 Ill. 28, 28 N. E. 382; Barnard v. Kellogg, 10 Wall. 383, 19 L. Ed. 987; Partridge v. Insurance Co., 15 Wall. 573, 21 L. Ed. 229; Globe Milling Co. v. Elevator Co., 44 Minn. 153, 46 N. W. 306; Menage v. Rosenthal, 175 Mass. 358, 56 N. E. 579. *See "Customs and Usages," Dec. Dig. (Key-No.) §§ 14, 17; Cent. Dig. §§ 29, 34.*

[60] Webster v. Cecil, 30 Beav. 62. See McCusker v. Spier, 72 Conn. 628, 45 Atl. 1011. *See "Specific Performance," Dec. Dig. (Key-No.) § 52; Cent. Dig. §§ 155–159.*

when the contract was made.[61] In such cases, extrinsic, and, if necessary, parol evidence will be admited to show the true intent of the parties. There must have been a genuine agreement;[62] its terms must have been expressed under mutual mistake;[63] and the evidence must be clear and convincing.

Where the mistake was not mutual, extrinsic evidence is only admitted in certain cases which appear to be regarded as having something of the character of fraud,[64] and is admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract, or having the contract annulled. Instances of such cases are where the mistake of one party was caused by the other, though not with any fraudulent intent, and was known to him before his position had been affected by the contract.[65] In these cases it is probable that the court will not reform or correct the instrument unless the parties can be placed in statu quo.

RULES OF CONSTRUCTION

Thus far we have dealt with the admissibility of evidence in relation to contracts in writing. We now come to deal with the rules of construction which govern the interpretation of the contract as it is proven to have been made between the parties.

[61] Beauchamp v. Winn, L. R. 6 H. L. 232; Murray v. Parker, 19 Beav. 305. *See "Evidence," Dec. Dig. (Key-No.) § 433; Cent. Dig. §§ 1990–2004.*

[62] MacKensie v. Coulson, L. R. 8 Eq. 368. *See "Evidence," Dec. Dig. (Key-No.) § 433; Cent. Dig. §§ 1990–2004.*

[63] Fowler v. Fowler, 4 De Gex & J. 250; Page v. Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Purvines v. Harrison, 151 Ill. 219, 37 N. E. 705; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; Spurr v. Home Ins. Co., 40 Minn. 424, 42 N. W. 206; King v. Holbrook, 38 Or. 452, 63 Pac. 651; Eaton, Eq. 620. *See "Evidence," Dec. Dig. (Key-No.) § 433; Cent. Dig. §§ 1990–2004.*

[64] Equity has jurisdiction to reform where there is mistake on one side caused by fraud on the other. Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Bush v. Merriman, 87 Mich. 260, 49 N. W. 567; Kyle v. Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866; Snell v. Insurance Co., 98 U. S. 85, 91, 25 L. Ed. 52; Kleinsorge v. Rohse, 25 Or. 51, 34 Pac. 874. *See "Evidence," Dec. Dig. (Key-No.) § 433; Cent. Dig. §§ 1990–2004.*

[65] Garrard v. Frankel, 30 Beav. 445; Harris v. Pepperell, L. R. 5 Eq. 1; Moffett, H. & C. Co. v. City of Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108. Cf. Trenton Terra Cotta Co. v. Shingle Co. (C. C.) 80 Fed. 46. *See "Evidence," Dec. Dig. (Key-No.) § 433; Cent. Dig. §§ 1990–2004.*

SAME—QUESTION FOR COURT OR JURY

218. The question as to whether or not the parties have made a particular contract is usually for the jury, but questions as to the construction of the contract are usually for the court.

In accordance with the general rule that the construction of written instruments is a function of the court rather than of the jury, it is ordinarily for the court to construe the meaning of writings relied on to make a contract.[66] And the same rule applies to oral contracts where there is no dispute as to the words used by the parties.[67] But all questions involving dispute as to matters of fact are for the jury. Whether, therefore, the parties have entered into a contract, or have used certain words, or have included certain terms are questions for the jury.[68] So, where ambiguous words in a contract are to be construed by extrinsic evidence or the surrounding circumstances, the meaning of such words becomes a question for the jury.[69]

SAME—GENERAL RULES

219. The three general rules of construction are that:

(a) Words are to be understood in their plain and literal meaning, but—

EXCEPTIONS—(1) Evidence of usage may vary the usual meaning of words.

(2) Technical words are to be given their technical meaning.

(3) The rule is subject to the following rules as to giving effect to the intention of the parties.

(b) An agreement should receive that construction which will best effectuate the intention of the parties.

[66] Ætna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712. *See "Contracts," Dec. Dig. (Key-No.) § 176; Cent. Dig. §§ 767–770; "Trial," Cent. Dig. § 326.*

[67] Embry v. Hargadine-McKittrick Dry Goods Co., 127 Mo. App. 383, 105 S. W. 777. *See "Contracts," Dec. Dig. (Key-No.) § 176; Cent. Dig. §§ 767–770; "Trial," Cent. Dig. § 326.*

[68] Embry v. Hargadine-McKittrick Dry Goods Co., supra; American Towing & Lightering Co. v. Baker-Whitley Coal Co., 111 Md. 504, 75 Atl. 341. *See "Contracts," Dec. Dig. (Key-No.) § 176; Cent. Dig. §§ 767–770.*

[69] French v. Fidelity & Casualty Co. of New York, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; Ætna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712 (technical terms). *See "Contracts," Dec. Dig. (Key-No.) § 176; Cent. Dig. §§ 767–770.*

(c) The intention of the parties is to be collected from the whole agreement.

220. Subsidiary to these rules are the following, tending to the same end—that is, the effecting of the intention of the parties:

(a) Obvious mistakes of writing or grammar, including punctuation, will be corrected.

(b) The meaning of general words will be restricted by more specific and particular descriptions of the subject-matter to which they apply.

(c) A contract susceptible of two meanings will be given the meaning which will render it valid.

(d) A contract will, if possible, be construed so as to render it reasonable rather than unreasonable.

(e) Words will generally be construed most strongly against the party who used them.

(f) In case of doubt, weight will be given the construction placed upon the contract by the parties.

(g) Where there is a conflict between printed and written words, the latter will control.

(1) The first general rule is that words are to be understood in their plain and literal meaning; and this rule is followed, though the consequences may not have been in the contemplation of the parties.[70] The rule, however, is subject to the qualification that a particular custom or usage, which, as we have seen, may be proved, may vary the usual meaning of words;[71] and that technical words are to be given their technical meaning.[72] It is also subject to the

[70] Hawes v. Smith, 12 Me. 429; Bullock v. Lumber Co., 3 Cal. Unrep. 609, 31 Pac. 367; Mansfield & S. City R. Co. v. Veeder, 17 Ohio, 385; Hall v. Bank, 53 Md. 120; Taylor v. Turley, 33 Md. 500; Pillsbury v. Locke, 33 N. H. 96, 66 Am. Dec. 711; Holmes v. Hall, 8 Mich. 66, 77 Am. Dec. 444; Stettauer v. Hamlin, 97 Ill. 312; Bradshaw v. Bradbury, 64 Mo. 334; Willmering v. McGaughey, 30 Iowa, 205, 6 Am. Rep. 673; Smith v. Bank, 171 Mass. 178, 50 N. E. 545; Fitzgerald v. Bank, 114 Fed. 474, 52 C. C. A. 276; PLANO MFG. CO. v. ELLIS, 68 Mich. 101, 35 N. W. 841, Throckmorton Cas. Contracts, 347. While parties to a contract are entitled to its literal performance, when practicable, that does not mean that courts and juries shall give to the terms of a contract, however clear and unmistakable the ordinary significance of the words employed, a meaning which, when applied to the subject-matter of the contract, will render performance impossible. Columbus Const. Co. v. Crane Co., 98 Fed. 946, 40 C. C. A. 35. *See "Contracts," Dec. Dig. (Key-No.) § 152; Cent. Dig. §§ 732, 733, 738.*

[71] Ante, p. 495.

[72] Ante, p. 495; Findley's Ex'rs v. Findley, 11 Grat. (Va.) 434; Ellmaker v. Ellmaker, 4 Watts (Pa.) 89; Maryland Coal Co. v. Railroad Co., 41 Md.

rules, which we will now explain, as to giving effect to the intention of the parties.

(2, 3) The cardinal or fundamental rule in the construction of contracts is that a contract should receive that construction which will best effectuate the intention of the parties.[73] This intention, however, is not one secretly cherished by a party, but is the intention expressed in the contract.[74] And it must be collected, not from detached parts of the agreement, but from the whole agreement.[75] "Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression

343; Eaton v. Smith, 20 Pick. (Mass.) 150; McAvoy v. Long, 13 Ill. 147; Rindskoff v. Barrett, 14 Iowa, 101. "The burden of proof of showing a special or technical or trade meaning is on him who asserts it." Parker, J., in American Lithographic Co. v. Commercial Casualty Ins. Co., 81 N. J. Law, 271, 80 Atl. 25. *See "Contracts," Dec. Dig. (Key-No.) § 152; Cent. Dig. § 733.*

[73] PLANO MFG. CO. v. ELLIS, 68 Mich. 101, 35 N. W. 841, Throckmorton Cas. Contracts, 347; Bell v. Jordan, 102 Me. 67, 65 Atl. 759; Salisbury v. King (Ky.) 119 S. W. 160; Hoffman v. Eastern Wisconsin Ry. & Light Co., 134 Wis. 603, 115 N. W. 383; Brown v. Beckwith, 60 Fla. 310, 53 South. 542; Chicago Flour Co. v. City of Chicago, 243 Ill. 268, 90 N. E. 674; Conservative Realty Co. v. St. Louis Brewing Ass'n, 133 Mo. App. 261, 113 S. W. 229 (holding that the rule applies whether the ambiguity is patent or latent). *See "Contracts," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 730, 743.*

[74] Embry v. Hargardine-McKittrick Dry Goods Co., 127 Mo. App. 383, 105 S. W. 777. *See "Contracts," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 730, 743.*

[75] PLANO MFG. CO. v. ELLIS, 68 Mich. 101, 35 N. W. 841, Throckmorton Cas. Contracts, 347; Mallan v. May, 13 Mees. & W. 511, 517; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Gray v. Clark, 11 Vt. 583; Heywood v. Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518; Field v. Leiter, 118 Ill. 17, 6 N. E. 877; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Walsh v. Trevanion, 15 Q. B. 733; Bell v. Bruen, 1 How. 169, 11 L. Ed. 89; Armstrong v. Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; Sattler v. Hallock, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686; McLean v. Windham Light & Power Co., 85 Vt. 167, 81 Atl. 613; Warrum v. White, 171 Ind. 574, 86 N. E. 959. Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other; and the different parts of one instrument will be read together. Wood v. College, 114 Ind. 320, 16 N. E. 619; Morss v. Salisbury, 48 N. Y. 636; Thomson v. Beal (C. C.) 48 Fed. 614; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Pensacola Gas Co. v. Lotze, 23 Fla. 368, 2 South. 609; Hagerty v. White, 69 Wis. 317, 34 N. W. 92; Sutton v. Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344; Bailey v. Railroad Co., 17 Wall. 96, 21 L. Ed. 611; Joy v. City of St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Hunt v. Livermore, 5 Pick. (Mass.) 395; Pierce v. Tidwell, 81 Ala. 299, 2 South. 15; Freer v. Lake, 115 Ill. 662, 4 N. E. 512; Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; American Gas & Oil Min. Co. v. Wood, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449. *See "Contracts," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 730, 743.*

of their intent." [76] Where the intention clearly appears from the words used, there is no need to go further, for in such a case the words must govern; or, as it is sometimes said, where there is no doubt, there is no room for construction.[77] The court will not attempt, under cover of construction, to make a new contract for the parties, nor to reform a written contract so as to make it express the real intention of the parties, which, by mistake, is not expressed in the words thereof.[78] But, if the meaning is not clear, the court will place itself, as nearly as may be, in the position of the parties to the contract,[79] and will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain their intention; and for this purpose, as we have seen, parol evidence is admissible.[80]

[76] Ford v. Beach, 11 Q. B. 852, 866; Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; Hoffman v. Insurance Co., 32 N. Y. 405, 88 Am. Dec. 337; Walker v. Douglas, 70 Ill. 445; Collins v. Lavelle, 44 Vt. 230; First Nat. Bank v. Gerke, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453; Hunter's Adm'rs v. Miller's Ex'rs, 6 B. Mon. (Ky.) 612; Gage v. Tirrell, 9 Allen (Mass.) 299; Ullmann v. Railway Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949; Wilkie v. New York Life Ins. Co., 146 N. C. 518, 60 S. E. 427; Newbern Banking & Trust Co. v. Duffy, 153 N. C. 62, 68 S. E. 915 [cit. Clark on Contracts (2d Ed.) §§ 218, 219]. If it clearly appears that a word was used inadvertently, or is inconsistent with the real intention, it will be rejected. Wells v. Tregusan, 2 Salk. 463; Dollman v. King, 4 Bing. (N. C.) 105; Buck v. Burk, 18 N. Y. 337; Stockton v. Turner, 7 J. J. Marsh. (Ky.) 192; Hibbard v. McKindley, 28 Ill. 240; Iredell v. Barbee, 31 N. C. 250. *See "Contracts," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 730, 743.*

[77] Dwight v. Insurance Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; Canterberry v. Miller, 76 Ill. 355; Noyes v. Nichols, 28 Vt. 159; Williamson v. McClure, 37 Pa. 402; Armstrong v. Granite Co., 47 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; Clark v. Mallory, 185 Ill. 227, 56 N. E. 1099; Abraham v. Railroad, 37 Or. 495, 60 Pac. 899, 64 L. R. A. 391, 82 Am. St. Rep. 779; Lambert Hoisting Engine Co. v. Paschall, 151 N. C. 27, 65 S. E. 523. *See "Contracts," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 730, 743.*

[78] Zohrlaub v. Mengelberg, 144 Wis. 564, 124 N. W. 247, 128 N. W. 975; Caverly-Gould Co. v. Village of Springfield, 83 Vt. 396, 76 Atl. 39. *See "Contracts," Dec. Dig. (Key-No.) § 168; Cent. Dig. § 751.*

[79] Close v. Browne, 230 Ill. 228, 82 N. E. 629, 13 L. R. A. (N. S.) 634. *See "Contracts," Dec. Dig. (Key-No.) § 169; Cent. Dig. § 752.*

[80] Zohrlaub v. Mengelberg, 144 Wis. 564, 124 N. W. 247, 128 N. W. 975; PLANO MFG. CO. v. ELLIS, 68 Mich. 101, 35 N. W. 841, Throckmorton Cas. Contracts, 347; Roberts v. Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689, and authorities there cited. And see Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Caperton's Adm'rs v. Caperton, 36 W. Va. 479, 15 S. E. 257; Penfold v. Insurance Co., 85 N. Y. 317, 39 Am. Rep. 660; Wilson v. Roots, 119 Ill. 379, 10 N. E. 204; Kuecken v. Voltz, 110 Ill. 264; Lacy v. Green, 84 Pa. 514; Excelsior Needle Co. v. Smith, 61 Conn. 56, 23 Atl. 693; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Gillett v. Bank,

These rules seem to be in conflict with the rule first stated. Taking them together they come substantially to this: that men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.

Subsidiary Rules

As subsidiary to the cardinal rule of ascertaining and giving effect to the intention of the parties, there are a number of subsidiary rules which are applied by the courts in the construction of contracts. As said in a recent Wisconsin case,[81] however, "no rule of construction merely is a strict rule of law. In applying and enforcing any and every contract, especially when reduced to writing, it is the duty of the court to ascertain what the parties really intended by the words used in the instrument, and so-called rules of construction are but aids or suggestions resulting from common experience to the effect that people generally, in arranging and using words, mean thus or so thereby."

(1) Courts will correct obvious mistakes in writing and grammar.[82] Accordingly, words may be transposed, rejected, or supplied,

160 N. Y. 549, 55 N. E. 292; Hull Coal & Coke Co. v. Coke Co., 113 Fed. 256, 51 C. C. A. 213; McLean v. Windham Light & Lumber Co., 85 Vt. 167, 81 Atl. 613. Thus, where a policy of marine insurance excepted the time "while the vessel is at Baker's Island loading," and the vessel was lost while there, but before it had begun to load, it was held, after evidence of the dangerous character of the place, that the intention of the parties was to except the time while the vessel was there for the purpose of loading, and not merely while it was actually loading. Reed v. Insurance Co., 95 U. S. 23, 24 L. Ed. 348. Prior negotiations between the parties may be considered in determining the meaning of an ambiguous contract. Potthoff v. Safety Armorite Conduit Co., 143 App. Div. 161, 127 N. Y. Supp. 994. *See "Contracts," Dec. Dig. (Key-No.) § 169; Cent. Dig. § 752.*

[81] Per Dodge, J., in Hoffmann v. Eastern Wisconsin Ry. & Light Co., 134 Wis. 603, 115 N. W. 383. *See "Contracts," Dec. Dig. (Key-No.) §§ 143, 147; Cent. Dig. §§ 723, 743.*

[82] Wilson v. Wilson, 5 H. L. Cas. 40, 66; Watson v. Blaine, 12 Serg. & R. (Pa.) 131, 14 Am. Dec. 669; Monmouth Park Ass'n v. Iron Works, 55 N. J. Law. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Harman v. Howe, 27 Grat. (Va.) 676; Caldwell v. Layton, 44 Mo. 220; Knisely v. Shenberger, 7 Watts (Pa.) 193; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; Cowles Electric Smelting & Aluminum Co. v. Lowrey, 79 Fed. 331, 24 C. C. A. 616; City of Garden City v. Heller, 61 Kan. 767, 60 Pac. 1060; Newbern Banking & Trust Co. v. Duffy, 153 N. C. 62, 68 S. E. 915 [cit. Clark on Contracts (2d Ed.) §§ 218,

if necessary, to make the meaning clear.[83] This rule includes another, namely, that the punctuation of a document, though it may aid in determining the meaning, will not control or change a meaning which is plain from a consideration of the whole document and the circumstances.[84]

(2) The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply.[85]

(3) Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render it invalid, the former will be adopted so as to uphold the contract.[86] Thus, where a document was expressed to be given "in consideration of your being in advance" to a person, and it was argued that this showed a past consideration which would not support the promise, the court held that the words "being in advance" might mean a prospective advance, and be equivalent to "in consideration of your becoming in advance," or "on condition of your being in advance."[87] So, also, where a contract is susceptible of two constructions, one of which will render it unlawful as being in viola-

219]. The word "and" may be read "or," or vice versa, to prevent an absurd or unreasonable result. Manson v. Dayton, 153 Fed. 258, 82 C. C. A. 588. *See "Contracts," Dec. Dig. (Key-No.) § 157; Cent. Dig. § 739.*

[83] Potthoff v. Safety Armorite Conduit Co., 143 App. Div. 161, 127 N. Y. Supp. 994. *See "Contracts," Dec. Dig. (Key-No.) § 147; Cent. Dig. §§ 730, 743.*

[84] White v. Smith, 33 Pa. 186, 75 Am. Dec. 589; Ewing v. Burnet, 11 Pet. 41, 9 L. Ed. 624; English's Ex'r v. McNair's Adm'rs, 34 Ala. 40; Osborn v. Farwell, 87 Ill. 89, 29 Am. Rep. 47; Holmes v. Insurance Co., 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308. See Joy v. City of St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 251, 34 L. Ed. 843. *See "Contracts," Dec. Dig. (Key-No.) § 158; Cent. Dig. § 740.*

[85] Phillips v. Barber, 5 Barn. & Ald. 161; Cullen v. Butler, 5 Maule & S. 461; Stettauer v. Hamlin, 97 Ill. 312; Dawes v. Prentice, 16 Pick. (Mass.) 435; Emery v. Fowler, 38 Me. 99; Vaughan v. Porter, 16 Vt. 266; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; Richmond Ice Co. v. Ice Co., 99 Va. 239, 37 S. E. 851. *See "Contracts," Dec. Dig. (Key-No.) § 156; Cent. Dig. § 737.*

[86] Olympia Bottling Works v. Olympia Brewing Co., 56 Or. 87, 107 Pac. 969. *See "Contracts," Dec. Dig. (Key-No.) § 156; Cent. Dig. § 737.*

[87] Haigh v. Brooks, 10 Adol. & E. 326. And see Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682; Field v. Leiter, 118 Ill. 17, 6 N. E. 877; Gano v. Aldridge, 27 Ind. 294; Reilly v. Chouquette, 18 Mo. 220; Hunter v. Anthony, 53 N. C. 385, 80 Am. Dec. 333; Saunders v. Clark, 29 Cal. 299; Wells v. Atkinson, 24 Minn. 161. *See "Contracts," Dec. Dig. (Key-No.) § 156; Cent. Dig. § 737.*

tion of law or contrary to public policy, that construction which will render it lawful will be adopted.[88]

(4) If possible without going contrary to the manifest intention of the parties, a contract will be so construed as to render it reasonable rather than unreasonable.[89] If the terms of the contract itself leave its meaning in doubt, "the court will ascribe to the parties an intention to enter into a fair agreement, and will adopt the construction which makes the contract equitable." [90]

(5) "Language must be interpreted in the sense in which the promisor knew, or had reason to know, the promisee understood it." [91]

(6) The courts will construe words most strongly against the party who used them. Words in an offer, for instance, will be construed most strongly against the proposer, and words in an acceptance most strongly against the acceptor; words in a promissory note most strongly against the maker; words in a policy of insurance most strongly against the insurer; and words in a conveyance, particularly of exception or reservation, most strongly against the grantor.[92] The principle on which this rule is based

[88] Archibald v. Thomas, 3 Cow. (N. Y.) 284; Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; United States v. Railroad Co., 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173; Lorillard v. Clyde, 86 N. Y. 384; Horton v. Rohlff, 69 Neb. 95, 95 N. W. 36. *See "Contracts," Dec. Dig. (Key-No.) § 156; Cent. Dig. § 737.*

[89] Atwood v. Emery, 1 C. B. (N. S.) 110; Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391; Wilson v. Marlow, 66 Ill. 385; Town of Royalton v. Turnpike Co., 14 Vt. 311; Bickford v. Cooper, 41 Pa. 142; Gillet v. Bank, 160 N. Y. 549, 55 N. E. 292; Pressed Steel Car Co. v. Railway Co., 121 Fed. 609, 57 C. C. A. 635. *See "Contracts," Dec. Dig. (Key-No.) § 154; Cent. Dig. § 735.*

[90] McLean v. Windham Light & Power Co., 85 Vt. 167, 81 Atl. 613, 621. And see Chicago, B. & Q. R. Co. v. Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; Stein v. Archibald, 151 Cal. 220, 90 Pac. 536. *See "Contracts," Dec. Dig. (Key-No.) § 154; Cent. Dig. § 735.*

[91] American Lithographic Co. v. Commercial Casualty Ins. Co., 81 N. J. Law, 271, 80 Atl. 25. *See "Contracts," Dec. Dig. (Key-No.) § 155; Cent. Dig. § 736.*

[92] Barney v. Newcomb, 9 Cush. (Mass.) 46; Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757; Jackson v. Gardner, 8 Johns. (N. Y.) 394; Duryea v. Mayor, etc., 62 N. Y. 592; Varnum v. Thruston, 17 Md. 471; Richardson v. People, 85 Ill. 495; Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61; Waterman v. Andrews, 14 R. I. 589; Hill v. Manufacturing Co., 79 Ga. 105, 3 S. E. 445; Phœnix Ins. Co. v. Slaughter, 12 Wall. 404, 20 L. Ed. 444; American Surety Co. v. Pauly, 170 U. S. 160, 18 Sup. Ct. 563, 42 L. Ed. 987; Snyder v. Insurance Co., 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625; Wilson v. Cooper (C. C.) 95 Fed. 625; Bowser v. Patrick (Ky.) 65 S. W. 824. The rule does not apply where it would cause a penalty or forfeiture.

has been said to be that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.[92] This rule of construction, it is sometimes said, is the last to be resorted to, and is never to be relied on except where other rules of construction fail.[94]

The liability of a guarantor or surety is said to be stricti juris, and is to be determined by the strict interpretation of the words used, and cannot be extended by implication.[95] Such contracts are nevertheless to be interpreted reasonably and according to the intention of the parties.[96] And if the contract is fairly sus-

A condition in a bond, for instance, is construed most strongly against the obligee. Butler v. Wigge, 1 Saund. 65; Hoffman v. Insurance Co., 32 N. Y. 405, 88 Am. Dec. 337; Bennehan v. Webb, 28 N. C. 57; Chicago, B. & Q. R. Co. v. City of Aurora, 99 Ill. 205. But a grant from the government is construed most strongly against the grantee. Canal Com'rs v. People, 5 Wend. (N. Y.) 423, 459; 2 Bl. Comm. 347; Raleigh & G. R. Co. v. Reid, 64 N. C. 155; Mayor, etc., of Allegheny v. Railroad Co., 26 Pa. 355; Hartford Bridge Co. v. Ferry Co., 29 Conn. 210; Northwestern Fertilizing Co. v. Village of Hyde Park, 70 Ill. 634; Mayor, etc., of City of New York v. Railroad Co., 97 N. Y. 275, 281. It is said, however, that this "rule of construction has been applied to gratuitous grants made by the sovereign of property, franchises, and privileges, upon the solicitation of the grantee," but that it does not apply, "certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted." Langdon v. Mayor, etc., 93 N. Y. 132. And see Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344, 485; Garrison v. U. S., 7 Wall. 688, 19 L. Ed. 277. *See "Contracts," Dec. Dig. (Key-No.) § 155; Cent. Dig. § 736.*

[92] Fowkes v. Association, 3 B. & S. 929; Gillet v. Bank, 160 N. Y. 549, 55 N. E. 292. A party must be deemed to have assented to a contract in the sense in which he knew the other intended it to signify, if the language is capable of that meaning. Cowles Electric Smelting & Aluminum Co. v. Lowrey, 79 Fed. 331, 24 C. C. A. 616. See, also, Leete v. Mining Co. (C. C.) 88 Fed. 957; Wood v. Allen, 111 Iowa, 97, 82 N. W. 451; People's Bldg. Ass'n v. Klauber, 1 Neb. (Unof.) 676, 93 N. W. 1072. *See "Contracts," Dec. Dig. (Key-No.) § 155; Cent. Dig. § 736.*

[94] Empire Rubber Mfg. Co. v. Morris, 73 N. J. Law, 602, 65 Atl. 450. *See "Contracts," Dec. Dig. (Key-No.) § 155; Cent. Dig. § 736.*

[95] Douglass v. Reynolds, 7 Pet. 125, 8 L. Ed. 626; People v. Backus, 117 N. Y. 196, 22 N. E. 759; Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232; Hopewell v. McGrew, 50 Neb. 789, 70 N. W. 397; Sherman v. Mulloy, 174 Mass. 41, 54 N. E. 345, 75 Am. St. Rep. 286. *See "Principal and Surety," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 103, 103½.*

[96] People v. Lee, 104 N. Y. 441, 10 N. E. 884; Powers v. Clarke, 127 N. Y. 417, 28 N. E. 402; Hooper v. Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St.

ceptible of two interpretations, and the other party has acted upon the interpretation most favorable to his rights, it seems that such interpretation will prevail.[87]

(7) Where the meaning of the terms used is clear, the fact that the parties have themselves, by their subsequent conduct or otherwise, placed an erroneous construction upon them, will not prevent the court from giving the true construction;[88] but, where the meaning is doubtful, such construction by the parties is of great weight in determining the true meaning, and in some cases may be controlling.[89]

(8) Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the latter will control.[1] Within the meaning of this rule, typewritten portions are regarded in the same manner as if written with the pen.[2]

Rep. 496; Northern Light Lodge v. Kennedy, 7 N. D. 146, 73 N. W. 524. *See "Principal and Surety," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 103, 103½.*

[87] Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64. *See "Principal and Surety," Dec. Dig. (Key-No.) § 59; Cent. Dig. §§ 103, 103½.*

[88] Railroad Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Holston Salt & Plaster Co. v. Campbell, 89 Va. 396, 16 S. E. 274; Hershey v. Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6; St. Paul & D. R. Co. v. Blackmar, 44 Minn. 514, 47 N. W. 172; Citizens' Fire Ins., Security & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Russell v. Young, 94 Fed. 45, 36 C. C. A. 71; Menage v. Rosenthal, 175 Mass. 358, 56 N. E. 579; Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134. *See "Contracts," Dec. Dig. (Key-No.) § 170; Cent. Dig. § 753.*

[89] French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Mitchell v. Wedderburn, 68 Md. 139, 11 Atl. 760; Hosmer v. McDonald, 80 Wis. 54, 49 N. W. 112; Leavitt v. Investment Co., 4 C. C. A. 425, 54 Fed. 439; People's Natural Gas Co. v. Wire Co., 155 Pa. 22, 25 Atl. 749; Hill v. City of Duluth, 57 Minn. 231, 58 N. W. 992; People v. Murphy, 119 Ill. 159, 6 N. E. 488; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; City of Cincinnati v. Coke Co., 53 Ohio St. 278, 41 N. E. 239; Childers v. Bank, 147 Ind. 430, 46 N. E. 825; Hale v. Sheehan, 52 Neb. 184, 71 N. W. 1019; Long-Bell Lumber Co. v. Stump, 86 Fed. 574, 30 C. C. A. 260. *See "Contracts," Dec. Dig. (Key-No.) § 170; Cent. Dig. § 753.*

[1] Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845; Clark v. Woodruff, 83 N. Y. 518; Chadsey v. Guion, 97 N. Y. 333; Thornton v. Railroad Co., 84 Ala. 109, 4 South. 197, 5 Am. St. Rep. 337; Hernandez v. Insurance Co., 6 Blatchf. 317, Fed. Cas. No. 6,415; Murray v. Pillsbury, 59 Minn. 85, 60 N. W. 844; Breyman v. Railroad Co. (C. C.) 85 Fed. 579; City of Chicago v. Weir, 165 Ill. 582, 46 N. E. 725; Commonwealth Title Ins. & Trust Co. v. Ellis, 192 Pa. 321, 43 Atl. 1034, 73 Am. St. Rep. 816. See, also, Sturm v. Baker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. *See "Contracts," Dec. Dig. (Key-No.) § 163; Cent. Dig. § 745.*

[2] Heyn v. New York Life Ins. Co., 192 N. Y. 1, 84 N. E. 725; Sprague Elec-

Terms Implied—Unexpressed Intention

Certain terms, though unexpressed, are imported into the contract by law without proof that they were intended by the parties. Unless a contrary intention was expressed, the law conclusively presumes that they intended to make them a part of their contract. "The unexpressed obligations in these instances, which are implied by law, are those which are inherent in the transaction according to its true nature, and may be regarded as the unexpressed intention of the parties. * * * It is generally said that contracts will be construed according to the intention of the parties. But this means, not only what they did actually intend, but also what, according to the essential nature of the particular transaction, the law considers that they should have intended. No intention can, however, be read into a contract unless it is thus a necessary legal implication. * * * When a particular kind of contract is made, it is presumed that the parties intended to embody all the legal consequences of the act, whether they knew of them or not, unless it can be seen from the language they used that they intended to exclude some of them." [3]

This principle is illustrated by an ordinary contract of sale. In all such contracts, in the absence of expression to the contrary, it is conclusively presumed that the seller intended to stipulate that he had the title to the proprety and the right to sell it. These implied stipulations are frequently called "implied warranties." Though unexpressed, they are imported into the contract by implication of law.[4]

On the other hand, however, "the law will not make a contract for parties which they have not made themselves, or imply agreements which have no foundation in necessity, and which it cannot be supposed that persons of ordinary prudence would have included in the contract." [5]

tric Co. v. Board of Com'rs, 83 Minn. 262, 86 N. W. 332. *See "Contracts," Dec. Dig. (Key-No.) § 163; Cent. Dig. § 745.*

[3] Brantly, Cont. 178, 179; Genet v. Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; Rioux v. Brick Co., 72 Vt. 148, 47 Atl. 406. *See "Contracts," Dec. Dig. (Key-No.) § 167; Cent. Dig. § 750.*

[4] El Paso & S. W. R. Co. v. Eichel & Weikel (Tex. Civ. App.) 130 S. W. 922, 935. *See "Sales," Dec. Dig. (Key-No.) § 266; Cent. Dig. §§ 743–759.*

[5] Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 N. E. 291, 294, per Cartwright, C. J. And see Caverly-Gould Co. v. Village of Springfield, 83 Vt. 396, 76 Atl. 39. *See "Contracts," Dec. Dig. (Key-No.) § 168; Cent. Dig. § 751.*

SAME—RULES AS TO TIME

221. At common law, time is always of the essence of a contract; but in equity it is otherwise, unless it was intended by the parties to make time of the essence, and their intention is expressed or to be implied. In the absence of such intention, the rule is that a reasonable time was meant. In some jurisdictions, by statute, the rule at law is the same as in equity.

When the contract fixes no time for performance, the contract is to be construed as allowing a reasonable time.[6] What is a reasonable time is a question to be determined in view of all the circumstances which may have been supposed reasonably to have been in contemplation of the parties.[7]

Where the contract fixes a time for performance, the time, at common law, is always of the essence of the contract; that is to say, if a person promises another to do a certain thing by a certain day, in consideration that the latter will do something for him, the thing must be done by the date named, or the latter is discharged from his promise. Courts of equity, however, look further into the intention of the parties, so as to ascertain whether, in fact, the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the latter was found to be the intention of the parties, equity would not refuse to enforce the contract if the promise required to be so performed was performed within a reasonable time.[8] And it may be stated

[6] Ellis v. Thompson, 3 Mees. & W. 445; Pope v. Manufacturing Co., 107 N. Y. 61, 13 N. E. 592; Boyd v. Gunnison, 14 W. Va. 11; Griffin v. Ogletree, 114 Ala. 343, 21 South. 488; Rogers v. Burr, 97 Ga. 10, 25 S. E. 339; Eppens, Smith & Wiemann Co. v. Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811; Kelley, Maus & Co. v. Hart-Parr Co., 137 Iowa, 713, 115 N. W. 490. *See "Contracts," Dec. Dig. (Key-No.) § 212; Cent. Dig. §§ 944–955.*

[7] Ellis v. Thompson, 3 Mees. & W. 445; Pinney v. Railroad Co., 19 Minn. 251 (Gil. 211); Stange v. Wilson, 17 Mich. 342; Coon v. Spaulding, 47 Mich. 162, 10 N. W. 183; Stewart v. Marvel, 101 N. Y. 357, 4 N. E. 743; McFadden v. Henderson, 128 Ala. 221, 29 South. 640. *See "Contracts," Dec. Dig. (Key-No.) § 212; Cent. Dig. §§ 944–955.*

[8] Maltby v. Austin, 65 Wis. 527, 27 N. W. 162; Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; Moote v. Scriven, 33 Mich. 500; Andrews v. Sullivan, 2 Gilman (Ill.) 327, 43 Am. Dec. 53; Garretson v. Vanloon, 3 G. Greene (Iowa) 128, 54 Am. Dec. 492; Taylor v. Baldwin, 27 Ga. 438, 73 Am. Dec. 736; Thurston v. Arnold, 43 Iowa, 43; Austin v. Wacks, 30 Minn. 335, 15

as a general rule that a court of equity will not treat time as of the essence of a contract, unless it affirmatively and clearly appears that the parties so regarded it.[9] It is always open to the parties, however, even in equity, to make time of the essence of the contract.[10] In some of the states, even where time is expressly declared to be of the essence of the contract, courts of equity will disregard the stipulation if its enforcement would be unconscionable.[11]

In England, and in some of our states, the distinction in this respect between the rules of law and equity has been swept away by statutes declaring, substantially, that stipulations in contracts as to time or otherwise, which would not theretofore have been deemed as of the essence of such contracts in a court of equity, should receive in all courts the same construction and effect as they would have received in equity.[12]

N. W. 409; Chapman & Dewey Land Co. v. Wilson, 91 Ark. 30, 120 S. W. 391. See Anson, Cont. (8th Ed.) 269. *See "Contracts," Dec. Dig. (Key-No.) § 211;*

[9] McLean v. Windham Light & Lumber Co., 85 Vt. 167, 81 Atl. 613. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943.*

[10] Lennon v. Napper, 2 Schrales & L. 682; Barnard v. Lee, 97 Mass. 92; Carter v. Phillips, 144 Mass. 100, 10 N. E. 500; Kemp v. Humphreys, 13 Ill. 573; Potter v. Tuttle, 22 Conn. 512; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Wells v. Smith, 7 Paige (N. Y.) 22, 31 Am. Dec. 274; Grigg v. Landis, 21 N. J. Eq. 494; Scott v. Fields, 7 Ohio, 90, pt. 2; Reed v. Breeden, 61 Pa. 460; Grey v. Tubbs, 43 Cal. 359; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Bullock v. Adams' Ex'rs, 20 N. J. Eq. 367; Jewett v. Black, 60 Neb. 173, 82 N. W. 375; McLean v. Windham Light & Lumber Co., 85 Vt. 167, 81 Atl. 613. Even where time is expressly declared to be of the essence, it may be waived by the conduct of the party for whose benefit the stipulation is made; as where he recognizes the contract as in force after the time for performance has passed, or directs changes making a longer time necessary. Brown v. Safe-Deposit Co., 128 U. S. 414, 9 Sup. Ct. 127, 32 L. Ed. 468; Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Amoskeag Mfg. Co. v. U. S., 17 Wall. 592, 21 L. Ed. 715; Paddock v. Stout, 121 Ill. 571, 13 N. E. 182; Pinckney v. Dambmann, 72 Md. 173, 19 Atl. 450. If the party prevents performance by the other, he cannot insist on the stipulation. Dannat v. Fuller, 120 N. Y. 554, 24 N. E. 815; King Iron Bridge & Mfg. Co. v. City of St. Louis (C. C.) 43 Fed. 768, 10 L. R. A. 826; Rees v. Logsdon, 68 Md. 93, 11 Atl. 708; Ward v. Matthews, 73 Cal. 13, 14 Pac. 604; post, p. 583. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943.*

[11] Richmond v. Robinson, 12 Mich. 193; Volz v. Grummett, 49 Mich. 453, 13 N. W. 814; Austin v. Wacks, 30 Minn. 335, 15 N. W. 409; Quinn v. Roath, 87 Conn. 16; Ballard v. Cheney, 19 Neb. 58, 26 N. W. 587. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943.*

[12] In Oklahoma it is provided by statute that "time is never considered as of the essence of a contract unless by its terms expressly so provided."

Where time is not made of the essence of the contract by express stipulation, it may nevertheless be held to have been intended from the nature of the contract.[13] In mercantile contracts, such as contracts for the manufacture and sale of goods, it is generally held that time is of the essence; and, where a term of the contract provides for the time of shipment or delivery, shipment or delivery at the time fixed will usually be regarded as a condition precedent, on the failure of which the other party may repudiate the whole contract.[14] In contracts for the sale of land, or for the performance of services, or the construction of buildings, and the like, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended, but generally, in such contracts, time is not of the essence.[15]

Snyder v. Stribling, 18 Okl. 168, 89 Pac. 222. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943.*

[13] New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789; Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Cabot v. Kent, 20 R. I. 197, 37 Atl. 945; Savannah Ice Delivery Co. v. Transit Co., 110 Ga. 142, 35 S. E. 280; Rioux v. Brick Co., 72 Vt. 148, 47 Atl. 406. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943.*

[14] BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO., 52 Fed. 700, 3 C. C. A. 248, Throckmorton Cas. Contracts, 350; Bowes v. Shand, 2 App. Cas. 455; Jones v. U. S., 96 U. S. 24, 24 L. Ed. 644; NORRINGTON v. WRIGHT, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, Throckmorton Cas. Contracts, 386; Cleveland Rolling-Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Cromwell v. Wilkinson, 18 Ind. 365; Camden Iron-Works v. Fox (C. C.) 34 Fed. 200; Scarlett v. Stein, 40 Md. 512; Lefferts v. Weld, 167 Mass. 531, 46 N. E. 107; Hull Coal & Coke Co. v. Coke Co., 113 Fed. 256, 51 C. C. A. 213. Cf. Coyne v. Avery, 189 Ill. 378, 59 N. E. 788. But it seems that, unless a contrary intention appears, stipulations as to the time of payment are not usually to be deemed of the essence. Martindale v. Smith, 1 Q. B. 389, 395; Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, 444; Monarch Cycle Mfg. Co. v. Wheel Co., 105 Fed. 324, 44 C. C. A. 523; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. See NORRINGTON v. WRIGHT, supra, per Gray, J. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943.*

[15] Brown v. Safe-Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; Goldsmith v. Guild, 10 Allen (Mass.) 239; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Derrett v. Bowman, 61 Md. 526; BECK & PAULI LITHOGRAPHING CO. v. COLORADO & ELEVATOR CO., 3 C. C. A. 248, 52 Fed. 700, Throckmorton Cas. Contracts, 350; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384; Hambly v. Railroad Co. (C. C.) 21 Fed. 541. *See "Contracts," Dec. Dig. (Key-No.) § 211; Cent. Dig. §§ 938–943; "Vendor and Purchaser," Dec. Dig. (Key-No.) § 78; Cent. Dig. §§ 121–125.*

SAME—RULES AS TO PENALTIES AND LIQUIDATED DAMAGES

222. If the parties fix upon a certain sum to be paid on breach of the contract,

(a) It may be recovered if it was really fixed upon as liquidated damages for nonperformance. This is subject to the rules of construction stated below.

(b) But, if it was intended in the nature of a penalty in excess of any loss likely to be sustained, the recovery will be limited to the loss actually sustained.

223. In determining whether the sum named is a penalty or liquidated damages, these rules may be stated:

(a) The courts will not be guided by the name given to it by the parties.

(b) If the matter of the contract is of certain value, a sum in excess of that value is a penalty.

(c) If the matter is of uncertain value, the sum fixed is liquidated damages.

(d) If a debt is to be paid by installments, it is no penalty to make the whole debt due on nonpayment of an installment.

(e) If some terms of the contract are of certain value, and some are not, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages.[16]

Where the parties to a contract affix a sum certain to be paid on the nonperformance of his promise by one or each of them, they may have intended (1) to assess the damages at which they rated the nonperformance of the promise, or (2) to secure its performance by imposing a penalty in excess of the actual loss likely to be sustained. If the former can, according to the rules to be presently mentioned, reasonably be construed to have been their intention, the sum named is recoverable as "liquidated damages," on breach of the promise. If the latter was their actual or presumed intention, the amount recoverable is limited to the loss actually sustained. Formerly, this rule existed only in equity, but for a long time it has been also applied in the courts of law.[17]

[16] Anson, Cont. (4th Ed.) 256.

[17] Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384. *See "Damages," Dec. Dig. (Key-No.) § 76; Cent. Dig. §§ 154, 155.*

Rules of Construction

In construing contracts in which such a term is introduced, the courts will not be guided by the name given to the sum to be paid. If it is liquidated damages, they will enforce it, though erroneously called a "penalty," and, on the other hand, if it is in the nature of a penalty, they will not allow it to be enforced, although designated "liquidated damages." [18]

(1) If the contract is for a matter of certain value, or value easily ascertainable, and a sum in excess of that value is fixed to be paid on breach of it, the sum so fixed is a penalty, and not liquidated damages.[19]

(2) If the contract is for a matter of uncertain value, and a sum is fixed to be paid on breach of it, and is not, on the face of the contract, so greatly in excess of the probable damage as to show that the parties could not have fixed upon it otherwise than as a penalty, the sum is recoverable as liquidated damages. There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree." [20] If the stip-

[18] Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; Wallis v. Carpenter, 13 Allen (Mass.) 19; Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Bignall v. Gould, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; Sanford v. Bank, 94 Iowa, 680, 63 N. W. 459; J. G. Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 599. *See "Damages," Dec. Dig. (Key-No.) § 78; Cent. Dig. § 157.*

[19] Clements v. Railroad Co., 132 Pa. 445, 19 Atl. 274, 276; Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Willson v. City of Baltimore, 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339. *See "Damages," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 164.*

[20] JAQUITH v. HUDSON, 5 Mich. 123, Throckmorton Cas. Contracts, 355; Kemble v. Farren, 6 Bing. 147; Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805; Maxwell v. Allen, 78 Me. 82, 2 Atl. 386, 57 Am. Rep. 783; Keeble v. Keeble, 85 Ala. 552, 5 South. 149; Cushing v. Drew, 97 Mass. 445; Tennessee Mfg. Co. v. James, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865; Fasler v. Beard, 39 Minn. 82, 38 N. W. 755; Lansing v. Dodd, 45 N. J. Law, 525; Trower v. Elder, 77 Ill. 452; Morse v. Rathburn, 42 Mo. 598, 97 Am. Dec. 359; Pennypacker v. Jones, 106 Pa. 237; May v. Crawford, 142 Mo. 390, 44 S. W. 260; City of New Britain v. Telephone Co., 74 Conn. 326, 50 Atl. 881, 1015; Pressed Steel Car Co. v. Railroad Co., 121 Fed. 609, 57 C. C. A. 635; Elizabethtown, etc., R. Co. v. Geoghegan, 9 Bush (Ky.) 57; Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1 and note. Stipulation in building contract for payment by contractor of certain sum for each day that work remains uncompleted after certain day construed as liquidated damages. Legge v. Harlock, 12 Q. B. 1015; Fletch v. Dyche, 2 Term R. 32; Hall v. Crowley, 5 Allen (Mass.) 304, 81 Am. Dec. 745; Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256; Monmouth Park Ass'n v. Iron Works, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626;

ulation is so construed, the plaintiff is limited to the amount named, though his actual damages may be greater.[21]

Courts lean against forfeiture, and towards construing stipulations for liquidated damages as penalties, when the amount on the face of the contract is out of all proportion to the possible loss; and many courts declare that the parties, even if they intended to fix upon the amount stipulated as liquidated damages, will nevertheless be limited to the recovery of actual damages if the amount stipulated for is so greatly in excess of the actual damages that it is in effect a penalty. In other words, the real question is "not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it." [22] Other courts, on the other hand, maintain that in such cases the intention of the parties must govern, and that whether a stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by agreement, to enforce the contract.[23] "It may, we think, fairly be stated,"

Lincoln v. Granite Co., 56 Ark. 405, 19 S. W. 1056; De Graff v. Wickham, 89 Iowa, 720, 52 N. W. 503, 57 N. W. 420; Fruin v. Railway Co., 89 Mo. 397, 14 S. W. 557; Texas & St. L. Ry. Co. v. Rust (C. C.) 19 Fed. 239; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. 398; Kunkel v. Wherry, 189 Pa. 198, 42 Atl. 112, 69 Am. St. Rep. 802; Illinois Cent. R. Co. v. Cabinet Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933; Drumheller v. Surety Co., 30 Wash. 530, 71 Pac. 25; Malone v. City of Philadelphia, 147 Pa. 416, 23 Atl. 628; Crawford v. Heatwole, 110 Va. 358, 66 S. E. 46, 34 L. R. A. (N. S.) 587 and note. But see, contra, where the stipulation was greatly in excess of any possible damage from the delay. Cochran v. Railway Co., 113 Mo. 359, 21 S. W. 6; Clements v Railroad Co., 132 Pa. 445, 19 Atl. 274, 276; Seeman v. Biemann, 108 Wis. 365, 84 N. W. 490. *See "Damages," Dec. Dig. (Key-No.) § 79; Cent. Dig. § 164.*

[21] Winch v. Ice Co., 86 N. Y. 618; Welch v. McDonald, 85 Va. 500, 8 S. E. 711. *See "Damages," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 179–187.*

[22] JAQUITH v. HUDSON, 5 Mich. 123, Throckmorton Cas. Contracts, 355. See, also, Myer v. Hart, 40 Mich. 517, 29 Am. Rep. 553; Jaqua v. Headington, 114 Ind. 309, 16 N. E. 527; Brewster v. Edgerly, 13 N. H. 275; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716; Colwell v. Lawrence, 38 N. Y. 71. "The intention is not all controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it." Streeper v. Williams, 48 Pa. 450. *See "Damages," Dec. Dig. (Key-No.) § 77; Cent. Dig. § 156.*

[23] Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240,

it was said in a late case in the supreme court of the United States,[24] "that when a claimed disproportion has been asserted in actions at law it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether bona fide to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

(3) If a debt is to be paid by installments, it is not imposing a penalty to provide that on default in any one payment the entire balance of unpaid installments shall fall due.[25]

(4) If the contract contains a number of terms, some of which are of a certain value, or if it contains a number of terms of widely different value, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages, however strongly the parties may have expressed their intention that it shall be so.[26] In a leading case on this point the defendant had agreed to act, and conform to all the regulations, at plaintiff's theater for several seasons, the plaintiff to pay him £3. 6s. 8d. for every night that the theater should be open for performance, and it was agreed that, for a breach of any term of the agree-

46 L. Ed. 366. See, also, Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 209; Wood v. Paper Co., 121 Fed. 818, 58 C. C. A. 256; Taylor v. Newspaper Co., 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473; Knox Rock Blasting Co. v. Stone Co., 64 Ohio St. 361, 60 N. E. 563; Emery v. Boyle, 200 Pa. 249, 49 Atl. 779; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Guerin v. Stacy, 175 Mass. 595, 56 N. E. 892. *See "Damages," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 170–175.*

[24] Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 672, 22 Sup. Ct. 240, 46 L. Ed. 366. *See "Damages," Dec. Dig. (Key-No.) § 80; Cent. Dig. §§ 170–175.*

[25] Protector Loan Co. v. Grice (Ct. App.) 5 Q. B. Div. 592; Dean v. Nelson, 10 Wall. 158, 19 L. Ed. 926. So of a stipulation that, if interest is not paid, the principal shall become due. Schooley v. Romain, 31 Md. 574, 100 Am. Dec. 87; Mobray v. Leckie, 42 Md. 474. *See "Damages," Dec. Dig. (Key-No.) § 78; Cent. Dig. § 163.*

[26] Kemble v. Farren, 6 Bing. 141; Carter v. Strom, 41 Minn. 522, 43 N. W. 394; Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; McPherson v. Robertson, 82 Ala. 459, 2 South. 333; Lampman v. Cochran, 16 N. Y. 275; Wilhelm v. Eaves, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; Hough v. Kugler, 36 Md. 186; Daily v. Litchfield, 10 Mich. 29; Trustees of First Orthodox Congregational Church v. Walrath, 27 Mich. 232; Trower v. Elder, 77 Ill. 452; Lyman v. Babcock, 40 Wis. 503; Monmouth Park Ass'n v. Warren, 55 N. J. Law, 598, 27 Atl. 932. *See "Damages," Dec. Dig. (Key-No.) § 78; Cent. Dig. § 163.*

ment by either party, the one in default should pay the other £1,000 which sum was thereby declared to be "liquidated and ascertained damages, and not a penalty." The court held that, in spite of the explicit statement of the parties that the sum was not to be regarded as a penalty, it must be so regarded. If the penal clause had been limited to breaches uncertain in their nature and amount it might, as was thought, have had the effect of ascertaining the damages; "but," it was said, "in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3. 6s. 8d. per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement." [27]

SAME—JOINT AND SEVERAL CONTRACTS

224. Whether or not a contract with several persons on either or both sides is to be construed as joint or several depends upon the intention of the parties as manifested in the evidence of their agreement.[28] The following rules may be stated:

LIABILITIES—(a) A promise by two or more in the plural number is prima facie joint, while a promise in the singular is prima facie several; but this presumption will yield if, from the whole agreement, a contrary intention appears.

[27] Kemble v. Farren, 6 Bing. 141. *See "Damages," Dec. Dig. (Key-No.) § 78; Cent. Dig. § 165.*

[28] 1 Pars. Cont. 10; Hall v. Leigh, 8 Cranch, 50, 3 L. Ed. 484; Olmstead v. Bailey, 35 Conn. 584; Eastman v. Wright, 6 Pick. (Mass.) 316; Willoughby v. Willoughby, 5 N. H. 244; Boggs v. Curtin, 10 Serg. & R. (Pa.) 211; Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399. *See "Contracts," Dec. Dig. (Key-No.) § 182; Cent. Dig. §§ 780–787.*

(b) Subscriptions by a number of persons to promote some common enterprise, though joint in form, are several promises.

RIGHTS—If the words will admit of it, the contract, as regards the promisees, will be joint or several, according as their interest is joint or several.

Joint and Several Liabilities

In all written contracts, the language used is the primary guide to the meaning; but it is not always conclusive. The language is sometimes ambiguous, and often not exclusive of an intention to contract either way. In such cases the sense must be derived from the interests and relations of the parties as appearing in the contract.[29] The same is true of oral contracts where there is no direct evidence of the intention. Wherever the promise is by two or more persons, as where the words "we promise," etc., are used, the liability is prima facie joint;[30] but the use of such expressions will not make the promise joint if, from the whole instrument, a contrary intention appears.[31] Where the promise is in the singular, the liability is prima facie several; but, as in other cases, the whole instrument may show a contrary intention, and this intention must govern.[32]

In the case of subscriptions by a number of persons to promote some common enterprise, the promises, though joint in form, are held to be several. Each subscriber is held to promise severally to pay the amount of his subscription, and an action against all the subscribers jointly will not lie. It clearly appears from the

[29] Keightley v. Watson, 3 Exch. 716; Streichen v. Fehleisen, 112 Iowa, 612, 84 N. W. 715, 51 L. R. A. 412; Smith v. Woodward, 51 Colo. 311, 117 Pac. 140; Morrison v. American Surety Co., 224 Pa. 11, 73 Atl. 10. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

[30] Sheppard's Touchstone, 375; CITY OF PHILADELPHIA v. REEVES & CABOT, 48 Pa. 472, Throckmorton Cas. Contracts, 333; Turley v. Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667; Morrison v. American Surety Co., 224 Pa. 11, 73 Atl. 10. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

[31] King v. Hoare, 13 Mees. & W. 494; Bartlett v. Robbins, 5 Metc. (Mass.) 184; Ehle v. Purdy, 6 Wend. (N. Y.) 629; New Haven & N. Co. v. Hayden, 119 Mass. 361; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; McArthur v. Board, 119 Iowa, 562, 93 N. W. 580. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

[32] March v. Ward, Peake, 130; Dill v. White, 52 Wis. 456, 9 N. W. 404; Fond du Lac Harrow Co. v. Haskins, 51 Wis. 135, 8 N. W. 15; Van Alstyne v. Van Slyck, 10 Barb. (N. Y.) 387; Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27; Slater v. Magraw, 12 Gill & J. (Md.) 265. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

character of such a contract that each subscriber only intends to bind himself for his own subscription, and this intention must prevail, notwithstanding the joint form of the promise.[83]

As we have seen, these rules are to a great extent modified by statute in most of the states.[84]

Joint and Several Rights

With respect to the rights of several persons under such contracts, the rule of construction has been thus stated:[85] "A contract will be construed to be joint or several, according to the interests of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous, or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several.[86] But a contract entered into with several persons, in respect of the same matter or interest, cannot by any words be made so as to entitle them both jointly and severally."[87]

[83] Davis v. Belford, 70 Mich. 120, 37 N. W. 919; Hall v. Thayer, 12 Metc. (Mass.) 130; Davis & Rankin Bldg. & Mfg. Co. v. Barber (C. C.) 51 Fed. 148; Chicago Bldg. & Mfg. Co. v. Graham, 78 Fed. 83, 23 C. C. A. 657; Davis & Rankin Bldg. & Mfg. Co. v. Booth, 10 Ind. App. 364, 37 N. E. 818; Cornish v. West, 82 Minn. 107, 84 N. W. 730, 52 L. R. A. 355. And see Waddy Bluegrass Creamery Co. v. Manufacturing Co., 103 Ky. 579, 45 S. W. 895. Contra, Davis v. Shafer (C. C.) 50 Fed. 764. *See "Contracts," Dec. Dig. (Key-No.) § 184; Cent. Dig. § 789.*

[84] Ante, p. 475.

[85] Leake, Cont. 218.

[86] Eccleston v. Clipsham, 1 W. Saund. 153; Sorsbie v. Park, 12 Mees. & W. 146; Pickering v. De Rochemont, 45 N. H. 67; Gould v. Gould, 6 Wend. (N. Y.) 263; Appleton v. Bascom, 3 Metc. (Mass.) 169; Capen v. Barrows, 1 Gray (Mass.) 376; Lombard v. Cobb, 14 Me. 222; Duncan v. Willis, 51 Ohio St. 433, 38 N. E. 13; Pennville Natural Gas & Oil Co. v. Thomas, 21 Ind. App. 1, 51 N. E. 351; Montana Min. Co. v. Milling Co., 19 Mont. 313, 48 Pac. 305; Curry v. Railway Co., 58 Kan. 6, 48 Pac. 579; Atlanta & St. A. B. R. Co. v. Thomas, 60 Fla. 412, 53 South. 510; International Hotel Co. v. Flynn, 238 Ill. 636, 87 N. E. 855, 15 Ann. Cas. 1059. Where two persons are accepted as depositors by a savings bank, and both sign the depositors' book, and the moneys are made payable to either, the contract is with both jointly, and has the incident of survivorship. Dunn v. Houghton (N. J. Ch.) 51 Atl. 71. *See "Contracts," Dec. Dig. (Key-No.) §§ 182–184; Cent. Dig. §§ 780–789.*

[87] Ante, p. 481, note 42.

CHAPTER XI

DISCHARGE OF CONTRACT

225. In General.
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233–234. Substituted Contract.
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266. By the Consent of the Parties.
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268–269. By Lapse of Time.

IN GENERAL

225. The modes in which a contract may be discharged are as follows:

(a) By agreement.
(b) By performance.
(c) By breach.
(d) By impossibility of performance.
(e) By operation of law.

It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. In dealing with this part of the subject we shall consider, not only the mode in which the original

contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.[1]

DISCHARGE OF CONTRACT BY AGREEMENT

226. A contract may be discharged by an agreement to that effect between the parties. This may be—

(a) By waiver, cancellation, or rescission.
(b) By a substituted contract.
(c) By the happening of conditions subsequent, expressed or implied in the contract.

227. Such an agreement must possess all the elements requisite to the formation of any other valid agreement. There are some exceptions as to the necessity for consideration, which will be hereafter noticed.

As it is their agreement which binds the parties, so by their agreement they may be loosed from the contractual tie. It is scarcely necessary to say that to render an agreement effective as a discharge it must be a valid agreement; and, to be so, it must be accompanied by all the elements, such as communication of mutual intention, real consent, parties having capacity, etc.[2]

SAME—WAIVER, CANCELLATION, OR RESCISSION

228. A contract may be discharged by an express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract.[3]

229. A waiver is a relinquishment of a right under a contract.

230. A rescission is a complete unmaking of the contract and contemplates the restoration of the parties to their original position as if the contract had not been made.[4]

[1] Anson, Cont. (4th Ed.) 257.

[2] Murray v. Harway, 56 N. Y. 337; Wheeler v. Railroad Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341; Stix v. Roulston, 88 Ga. 743, 15 S. E. 826; O'Donnell v. Brand, 85 Wis. 97, 55 N. W. 154; Wood v. Moriarty, 16 R. I. 201, 14 Atl. 855; Lauer v. Lee, 42 Pa. 165; Smith v. Watson, 82 Va. 712, 1 S. E. 96. *See "Contracts," Dec. Dig. (Key-No.) § 253; Cent. Dig. §§ 1146–1148.*

[3] Anson, Cont. (4th Ed.) 258–260.

[4] KELLETT v. ROBIE, 99 Wis. 303, 74 N. W. 781, Throckmorton Cas. Con-

231. Cancellation is sometimes used in the sense of rescission, but more properly it signifies the defacing of a written contract with intent to destroy its legal effect.

232. A consideration is necessary to support such an agreement, except:

EXCEPTIONS—(a) Where the agreement is under seal.
(b) A negotiable instrument may be discharged by its mere surrender with an intent to discharge it.

Waiver is to be distinguished from a rescission, in that it is a mere release of, or failure to insist upon, a right; whereas a rescission destroys the entire contract and entitles each party to recover any consideration given by him under it.[5] Rights acquired by contract may be relinquished or abandoned, either by agreement or by conduct indicating such a purpose.[6] In order, however, that a waiver may be binding upon a party, it must clearly appear that there was an intentional relinquishment of a known right.[7]

In the absence of a consideration, a promise to forego the right to demand performance of a contract would be nudum pactum and void. It has often been said that "a simple contract may, before breach, be waived or discharged without a deed and without consideration"; but this is inaccurate. A consideration, or a deed dispensing with the necessity for a consideration, is always essential. Where the contract is wholly executory, a mere agreement between the parties, that it shall no longer bind them, is valid, for the discharge of each by the other from his liabilities under the contract is a sufficient consideration for the promise of the other to forego his rights.[8] If the agreement is not mutual

tracts, 363. *See "Contracts," Dec. Dig. (Key-No.) § 274; Cent. Dig. §§ 1202–1206.*

[5] Reiger v. Turley, 151 Iowa, 491, 131 N. W. 866; Lewis v. Gay, 151 N. C. 168, 65 S. E. 907; J. K. Armsby Co. v. Grays Harbor Commercial Co., 62 Or. 173, 123 Pac. 32. *See "Contracts," Dec. Dig. (Key-No.) §§ 252, 262; Cent. Dig. §§ 1145, 1181–1183.*

[6] Burns v. McFarland, 146 N. C. 382, 59 S. E. 1011. *See "Contracts," Dec. Dig. (Key-No.) § 256; Cent. Dig. § 1151.*

[7] Boyden v. Hill, 198 Mass. 477, 85 N. E. 413; Fitzgerald v. Frankel, 109 Va. 603, 64 S. E. 941. *See "Contracts," Dec. Dig. (Key-No.) § 256; Cent. Dig. § 1151.*

[8] Rollins v. Marsh, 128 Mass. 116; Cutter v. Cochrane, 116 Mass. 408; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Blagborne v. Hunger, 101 Mich. 375, 59 N. W. 657; Perkins v. Hoyt, 35 Mich. 506; Flegal v. Hoover, 136 Pa. 276, 27 Atl. 162; Farrar v. Tolliver, 88 Ill. 408; Hobbs v. Brick Co., 157 Mass. 109, 31 N. E. 756; Wind-

—that is, if it is a waiver of his rights by one party only,—there is no consideration, and the agreement is void.[9] If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of consideration.[10] To illustrate these distinctions: If a person agrees to buy goods from another, or to perform services for him, and the other agrees to pay therefor, the contract may be discharged by a simple agreement to that effect, so long as the goods or services have not been delivered or performed, and the money has not been paid. After performance on either side, however, a promise by the party so performing not to require performance by the other would not be binding unless under seal or supported by a consideration.

In England there is an exception to this rule in the case of bills of exchange and promissory notes. The rights of the holder of such instruments may there be waived and discharged without any consideration for their waiver.[11] In this country the exception is not recognized. Such instruments, in this respect, stand on the same footing as any other simple contract,[12] with this exception, namely, that, if the instrument itself is destroyed or surrendered for the purpose of discharging the debt, it will so operate without any consideration.[13] The reason for the exception is that there is a valid executed gift of the instrument.[14]

ham v. Doles, 59 Ga. 265; Brown v. Lumber Co., 117 N. C. 287, 23 S. E. 253; ante, p. 158. *See "Contracts," Dec. Dig. (Key-No.) § 255; Cent. Dig. § 1150.*

[9] King v. Gillett, 7 Mees. & W. 55. *See "Contracts," Dec. Dig. (Key-No.) § 255; Cent. Dig. § 1150.*

[10] Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Crawford v. Millspaugh, 13 Johns. (N. Y.) 87; Kidder v. Kidder, 33 Pa. 268; Moore v. Locomotive Works, 14 Mich. 266; Maness v. Henry, 96 Ala. 454, 11 South. 410; Landon v. Hutton, 50 N. J. Eq. 500, 25 Atl. 953; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; ante, p. 161. *See "Contracts," Dec. Dig. (Key-No.) § 255; Cent. Dig. § 1150.*

[11] Foster v. Dawber, 6 Exch. 839. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 143, 438; Cent. Dig. §§ 1277, 1278.*

[12] Crawford v. Millspaugh, 13 Johns. (N. Y.) 87; Seymour v. Minturn, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; Smith v. Bartholomew, 1 Metc. (Mass.) 276, 25 Am. Dec. 365; In re Campbell's Estate, 7 Pa. 100, 47 Am. Dec. 503. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 143, 438; Cent. Dig. §§ 1277, 1278.*

[13] Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168; Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; Paxton v. Wood, 77 N. C. 11; In re Campbell's Estate, 7 Pa. 100, 47 Am. Dec. 503; Albert's Ex'rs v. Ziegler's Ex'rs, 29 Pa. 50; Stewart v. Hidden, 13 Minn. 43 (Gil. 29); Ellsworth v. Fogg, 35 Vt. 355. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 143, 438; Cent. Dig. §§ 1277, 1278.*

[14] Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168. *See "Bills and Notes," Dec. Dig. (Key-No.) §§ 143, 438; Cent. Dig. §§ 1277, 1278.*

The consent of a party to the rescission of a contract may be shown by evidence of his acts or declarations in the same manner in which the consent of a party to the original contract may be shown by conduct.[15]

SAME—SUBSTITUTED CONTRACT

233. A contract may be discharged by the substitution of a new contract,[16] and this results—

(a) Where a new contract is expressly substituted for the old one.

(b) Where a new contract is inconsistent with the old one.

(c) Where new terms are agreed upon.

(d) Where a new party is substituted for one of the original parties by agreement of all three.

234. As in the case of contracts generally, the agreement of the parties may be evidenced by their conduct.

The difference between this mode and a discharge by rescission is that a discharge by rescission is a total obliteration of the contract, while by this mode a new bond between the parties is substituted in the place of the old one. A contract may be thus discharged either by the making of an entirely new and independent contract relating to the same subject, or merely by the introduction of new terms. In the latter case the new contract consists of the new terms and so much of the original contract as remains unchanged. If, for instance, parties who have contracted for the construction of a building according to specifications, and at a price, to be paid partly in cash and partly in some other way, should afterwards agree upon a change in the specifications and an increase in the cash payment, there would be

[15] KELLETT v. ROBIE, 99 Wis. 303, 74 N. W. 781, Throckmorton Cas. Contracts, 363; Hanson & Parker v. Wittenberg, 205 Mass. 319, 91 N. E. 383. *See "Contracts," Dec. Dig. (Key-No.) § 253; Cent. Dig. §§ 1146–1148.*

[16] McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Hurlock v. Smith, 39 Md. 436; King v. Faist, 161 Mass. 449, 37 N. E. 456; Rollins v. Marsh, 128 Mass. 116; Cutter v. Cochrane, 116 Mass. 408; Farrar v. Tolliver, 88 Ill. 408; Windham v. Doles, 59 Ga. 265; Brown v. Everhard, 52 Wis. 205, 8 N. W. 725; Tingley v. Land Co., 9 Wash. 34, 36 Pac. 1098; Sioux City Stock-Yards Co. v. Packing Co., 110 Iowa, 396, 81 N. W. 712; Andre v. Graebner, 126 Mich. 116, 85 N. W. 464; Brown v. Lumber Co., 117 N. C. 287, 23 S. E. 253; Dreifus v. Exposition Salvage Co., 194 Pa. 475, 45 Atl. 370, 75 Am. St. Rep. 704. As to payment by negotiable instrument, see post, p. 546. *See "Contracts," Dec. Dig. (Key-No.) § 246; Cent. Dig. §§ 1131–1133.*

substituted for the original contract a new contract, consisting of the new terms and the unchanged terms of the original.[17]

A new contract inconsistent with the original impliedly discharges the latter without an express provision to that effect;[18] and, if new terms are agreed upon, they will by implication waive those terms of the original which are inconsistent with them, and a new contract will result, consisting, as we have seen, of the new terms and the unchanged or consistent terms of the original contract.[19] An illustration is furnished by cases in which a contractor undertakes building operations for another which are to be completed by a certain time, in default of which a sum is to be paid as compensation for the delay. If, while the building is in progress, an agreement is made for additional work, by which it becomes impossible to complete the building within the time stipulated, it is universally held that the subsequent agreement is so far inconsistent with the first as to amount to a waiver of the original stipulation as to time; and, since an agreement may be made by conduct as well as by words, this principle would apply where performance within the specified time is prevented by the conduct of the other party.[20]

Where it is claimed that a contract has been discharged by a new contract, or by the introduction of new terms, the intention to discharge must distinctly appear, to give rise to such an implication, from the inconsistency of the new terms with the old ones.[21] A mere postponement of performance for the convenience

[17] Green v. Paul, 155 Pa. 126, 25 Atl. 867; Hannibal H. Chandler & Co. v. Knott, 86 Iowa, 113, 53 N. W. 88; McNish v. Reynolds, 95 Pa. 483. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[18] Patmore v. Colburn, 1 Cromp. M. & R. 65; Renard v. Sampson, 12 N. Y. 561; Stow v. Russell, 36 Ill. 18; Howard v. Railroad Co., 1 Gill (Md.) 311; Chrisman v. Hodges, 75 Mo. 413; Paul v. Meservey, 58 Me. 419; Harrison v. Lodge, 116 Ill. 279, 5 N. E. 543; Domenico v. Association (D. C.) 112 Fed. 554, 557. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[19] Thornhill v. Neats, 8 C. B. (N. S.) 831; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263; Cornish v. Suydam, 99 Ala. 620, 13 South. 118; Farrar v. Toliver, 88 Ill. 408; Rollins v. Marsh, 128 Mass. 116; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Housekeeper Pub. Co. v. Swift, 97 Fed. 290, 38 C. C. A. 187; Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[20] Thornhill v. Neats, 8 C. B. (N. S.) 831. And see Cornish v. Suydam, 99 Ala. 620, 13 South. 118; Stewart v. Keteltas, 36 N. Y. 388; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Howard v. Railroad Co., 1 Gill (Md.) 311; Huckestein v. Kelly, 152 Pa. 631, 25 Atl. 747. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[21] Millsaps v. Bank, 71 Miss. 361, 13 South. 903; Uhlig v. Barnum, 43 Neb.

of one of the parties, or an agreement to accept performance at a different place than that stipulated, does not operate as a discharge.[22] This question sometimes arises in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, and then refuses to accept the goods at all, alleging that the contract was discharged by the alteration of the time of performance; that a new contract was thereby substituted, which is void for noncompliance with the statute of frauds. The courts, however, have always recognized "the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another," [23] and will not regard the latter as affecting the rights of the parties further than this: that, if a man asks to have performance of his contract postponed, he does so at his own risk; for, if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, or when, by nonperformance, the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.[24]

Again, a contract may be discharged by the introduction of new parties into the original agreement, whereby a new contract is created, in which the terms remain the same, but the parties are different. This is termed a "novation." We have already spoken of it as an apparent exception to the rule that the rights and liabilities under a contract cannot be assigned at law.[25] Such a substitution may be made (1) by express agreement, or (2) by conduct of the parties indicating acquiescence in a change of liability. If, for instance, A. owes B. $100, and B. owes C. $100, it may be agreed between all three that A. shall pay C. instead of paying B., so that B. thereby terminates his legal relations

584, 61 N. W. 749. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[22] Hickman v. Haynes, L. R. 10 C. P. 606; Lawson v. Hogan, 93 N. Y. 39; Watkins v. Hodges, 6 Har. & J. (Md.) 38; Franklin Fire Ins. Co. v. Hamill, 5 Md. 170; Bacon v. Cobb, 45 Ill. 47; McCombs v. McKennan, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[23] Hickman v. Haynes, L. R. 10 C. P. 606. *See "Sales," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 251–253, 259.*

[24] Anson, Cont. (4th Ed.) 261; Ogle v. Earl Vane, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272. *See "Sales," Dec. Dig. (Key-No.) §§ 89, 90; Cent. Dig. §§ 251–253, 259.*

[25] Ante, p. 456.

with both A. and C.[26] The consideration for A.'s promise to pay C. is the discharge of B. by C.; the consideration of B.'s discharge of A. is the extinguishment of his debt to C.; and the consideration of C.'s discharge of B. is the promise of A. It would not be enough for A. to say to C., "I will pay you instead of B.," and to afterwards suggest the arrangement to B. and receive his assent;[27] nor would it be enough for B. to authorize A. in writing to pay to C., and for A. to acknowledge the paper.[28] All three must enter into the agreement, and the original liability must be extinguished. This is essential, because it is the promise of each that is the consideration for the promise of the others.[29]

As we have said, such a substitution and discharge may arise otherwise than by express agreement; it may arise from the conduct of the parties indicating acquiescence in a change of liability. If a person, for instance, enters into a contract with two others, and the latter agree between themselves that one of them shall retire from the contract and cease to be liable upon it, the first-mentioned party may either insist upon the continued liability of the party remaining, or may treat the contract as broken and discharged by such renunciation of his liabilities by the

[26] Tatlock v. Harris, 3 Term R. 174; Heaton v. Angier, 7 N. H. 397, 28 Am. Dec. 353; Sterling v. Ryan, 72 Wis. 36, 37 N. W. 572, 7 Am. St. Rep. 818; McKinney v. Alvis, 14 Ill. 33; Litchfield v. Garratt, 10 Mich. 426; McClellan v. Robe, 93 Ind. 298; Mulgrew v. Cocharen, 96 Mich. 422, 56 N. W. 70; Id., 98 Mich. 582, 57 N. W. 739; Atwood v. Town of Mt. Holly, 65 Vt. 121, 26 Atl. 491; Byrd v. Bertrand, 7 Ark. 321; Foster v. Paine, 63 Iowa, 85, 18 N. W. 699; Gardner v. Caylor, 24 Ind. App. 521, 56 N. E. 134; Minder & Jorgenson Land Co. v. Brustuen, 26 S. D. 38, 127 N. W. 546. *See "Novation," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[27] Cuxon v. Chadley, 3 Barn. & C. 591; Barnes v. Insurance Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438. *See "Novation," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[28] Liversidge v. Broadbent, 4 Hurl. & N. 603; ante, p. 456. *See "Novation," Dec. Dig. (Key-No.) § 7; Cent. Dig. § 7.*

[29] Liversidge v. Broadbent, 4 Hurl. & N. 603; Cuxon v. Chadley, 3 Barn. & C. 591; Wood v. Moriarty, 16 R. I. 201, 14 Atl. 855; First Nat. Bank v. Hall, 101 U. S. 50, 25 L. Ed. 822; Hard v. Burton, 62 Vt. 314, 20 Atl. 269; Spycher v. Werner, 74 Wis. 436, 43 N. W. 161, 5 L. R. A. 414; McKinney v. Alvis, 14 Ill. 33; Smith v. Watson, 82 Va. 712, 1 S. E. 96; Black v. De Camp, 78 Iowa, 718, 43 N. W. 625; Bowen v. Railroad Co., 34 S. C. 217, 13 S. E. 421; Haubert v. Mausshardt, 89 Cal. 433, 26 Pac. 899; Morrison v. Kendall, 6 Ind. App. 212, 33 N. E. 370; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; Campbell v. Clay, 4 Colo. App. 551, 36 Pac. 909; Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Cornwell v. Megins, 39 Minn. 407, 40 N. W. 610; Levy v. Ford, 41 La. Ann. 873, 6 South. 671. Cf. Clough v. Giles, 64 N. H. 73, 5 Atl. 835; Wolters v. Thomas (Cal.) 32 Pac. 565; Casey v. Miller, 8 Idaho (Hasb.) 567, 32 Pac. 195. *See "Novation," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 3; "Contracts," Cent. Dig. § 256.*

party so attempting to withdraw. If, however, under some circumstances, the first-mentioned party, after he becomes aware of the retirement of one of the other parties, continues to deal with the remaining party as though no change has taken place, he acquiesces, and may be considered to have entered into a new contract to accept the sole liability of the party so remaining, and cannot hold the other to his original contract. Cases of this sort arise where a member retires from a partnership, after the firm has entered into a contract, and it is subsequently sought to hold him liable thereon. "I apprehend the law to be now settled," said Parke, B., "that if one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all the three parties—the creditor, the old firm, and the new firm—be transferred to the new firm." [80] Moreover, a retired partner may be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm.[81] An agreement to discharge a retired partner, and look only to a continuing partner, is not inoperative for want of consideration.[82] And when the new firm agrees to assume the liabilities of the old, slight circumstances will support an inference of assent on the part of a creditor who had notice of the dissolution to a novation.[83]

In order that a contract may be discharged in whole or in part by a subsequent agreement the latter must be supported by a consideration.[84] Such a consideration may consist, however, in

[80] Hart v. Alexander, 2 Meea. & W. 484. And see Ludington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601; Filipini v. Stead, 4 Misc. Rep. 405, 23 N. Y. Supp. 1061. Cf. Ayer v. Kilner, 148 Mass. 468, 20 N. E. 163. But see Wadhams v. Page, 1 Wash. 420, 25 Pac. 462; Id., 6 Wash. 103, 32 Pac. 1068; Campbell v. Floyd, 153 Pa. 84, 25 Atl. 1033. Where a creditor of a partnership, after dissolution, accepts the note of some of the partners in payment of the firm debt, intending that it shall satisfy the original obligation, the other partner is discharged. Waydell v. Luer, 3 Denio (N. Y.) 410; Millerd v. Thorn, 56 N. Y. 402; Ludington v. Bell, supra; Powell v. Blow, 34 Mo. 485; Stone v. Chamberlin, 20 Ga. 259; Maxwell v. Day, 45 Ind. 509. But not if there is no such intention. Post, p. 547, note 2. *See "Partnership," Dec. Dig. (Key-No.) §§ 236–238; Cent. Dig. §§ 484–491.*

[81] York v. Orton, 65 Wis. 6, 26 N. W. 166. *See "Partnership," Dec. Dig. (Key-No.) § 236; Cent. Dig. §§ 484–486.*

[82] Thompson v. Percival, 5 Barn. & Ad. 925; Backus v. Fobes, 20 N. Y. 204; Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370. *See "Partnership," Dec. Dig. (Key-No.) § 236; Cent. Dig. §§ 484–486.*

[83] Regester v. Dodge (C. C.) 6 Fed. 6; Shaw v. McGregory, 105 Mass. 96; Tysen v. Somerville, 35 Fla. 219, 17 South. 567. *See "Partnership," Dec. Dig. (Key-No.) § 239; Cent. Dig. §§ 487–499.*

[84] Whitsett v. Carney (Tex. Civ. App.) 124 S. W. 443. *See "Contracts," Dec. Dig. (Key-No.) § 237; Cent. Dig. §§ 1119–1122.*

a change of the rights and liabilities of the parties and the consequent extinction of those which before existed.[35] On principle, it would seem that, if a person should refuse to perform a contract simply because he would suffer a loss by performing, a promise by the other party to pay him more, or to accept less, than originally agreed upon, to induce him to go on with the contract, would be without consideration. We have already seen that on this question the authorities are not in accord.[36]

SAME—FORM OF DISCHARGE BY NEW AGREEMENT

235. The general rule is that a contract must be discharged in the same form as that in which it was made. Therefore:

(a) A contract under seal can only be discharged by agreement, where the agreement is under seal; but by the weight of authority, in this country, at least, the rule does not apply where a parol contract rescinding or modifying a contract under seal has been acted upon, so that it would be inequitable to hold the parties to their original contract.

(b) A simple contract may be discharged by writing or by word of mouth, whether or not the original contract is in writing, except that—

EXCEPTION—Where the original written contract was within the statute of frauds, though an absolute discharge by rescission may take place by word of mouth, a discharge by substituted agreement must, by the weight of authority, be in writing.

The general rule of the common law being that a contract can only be discharged in the same form as that in which it was made, it follows that an agreement, to operate as a discharge or modification of a previous contract under seal, must also be under seal. The parties to a deed cannot, at common law, discharge their obligation by a parol agreement.[37] This rule is, however, subject to some qualifications or exceptions.

[35] Welch v. Mischke, 154 Mo. App. 728, 136 S. W. 36. And see note 16, supra. *See "Contracts," Dec. Dig. (Key-No.) § 237; Cent. Dig. §§ 1119–1122.*

[36] Ante, p. 158.

[37] Spence v. Healey, 8 Ex. 668; West v. Blakeway, 2 Man. & G. 729; Allen v. Jaquish, 21 Wend. (N. Y.) 628; Thompson v. Brown, 7 Taunt. 656; Spence v. Healey, 8 Exch. 668; Cordwert v. Hunt, 8 Taunt. 596; Woodruff v. Dobbins, 7 Blackf. (Ind.) 582; Hogencamp v. Ackerman, 24 N. J. Law, 133; McMurphy v. Garland, 47 N. H. 316; Leavitt v. Stern, 159 Ill. 526, 42 N. E. 869. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

In the first place, it is possible for them to make a parol contract which creates obligations separate from, and yet substantially at variance with, the deed, so that it in effect contravenes the terms of the deed, and gives a right of action to which the deed furnishes no answer. In a case illustrative of this point a person had let rooms to another, by contract under seal, for a certain time, at a rent to be ascertained in a certain way, and after his death his administrator entered into a parol agreement with the lessee by which, in consideration of a certain sum to be paid by the lessee, to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. The lessee failed to make the payment so agreed upon, and the administrator sued him upon the parol contract. The lessee contended that the parol contract was an attempt to vary the deed by an instrument not under seal, and that a performance of this contract, being no discharge of the deed, would leave him liable to his obligation under the deed. The court held, however, that the parol contract created a new obligation; and that a performance of this new contract would furnish an equitable answer to an action on the contract under seal; and that the administrator was entitled to sue on the parol contract.[38]

Again, where the obligee does something to prevent performance by the obligor, as where he orally consents to an extension of the time for performance, and the oral waiver is acted upon, when he sues the obligor for nonperformance, he cannot object to parol evidence of his conduct.[39]

There is an exception very generally recognized in this country, though not in England, it seems.[40] The cases are not very clear as to the limits of this exception, but they seem to establish the rule that where a contract under seal has been rescinded or modified by a subsequent parol agreement, and this agreement has been acted upon by the parties, and they have changed their situation so that it would be inequitable to hold them to the original contract, the parol agreement may be shown;[41] and this rule is

[38] Nash v. Armstrong, 10 C. B. (N. S.) 259. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

[39] Fleming v. Gilbert, 3 Johns. (N. Y.) 528; Nicholas v. Austin, 82 Va. 817, 1 S. E. 132; Franklin Fire Ins. Co. of Philadelphia v. Hamill, 5 Md. 170; Baltimore Fire Ins. Co. v. McGowan, 16 Md. 47; Lawrence v. Miller, 86 N. Y. 131. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

[40] The rule is recognized in equity. Steeds v. Steeds, 22 Q. B. Div. 537. *See "Contracts," Dec. Dig. (Key-No.) § 239; Cent. Dig. § 1124.*

[41] Becker v. Becker, 250 Ill. 117, 95 N. E. 70, Ann. Cas. 1912B, 275. *See "Contracts," Dec. Dig. (Key-No.) § 239; Cent. Dig. § 1124.*

recognized at law as well as in equity.[42] Though the language of most of the opinions in these cases is as broad as the rule stated, it will be found that some of them will fall within one or the other of the qualifications of the rule mentioned above.

A parol or simple contract may be discharged by writing or by word of mouth. It is immaterial that the original contract is in writing, for, as we have seen, the writing is not the agreement, but the evidence of the agreement only.[43] There is an exception in cases where the original agreement was required by the statute of frauds to be in writing. In such a case an absolute discharge might probably take place by word of mouth.[44] If, however, the discharge is not a simple rescission, but is by substitution of a new contract, either by express provision, or by implication

[42] McKENZIE v. HARRISON, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638, Throckmorton Cas. Contracts, 365; Chesapeake & O. Canal Co. v. Ray, 101 U. S. 522, 25 L. Ed. 792; McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; Le Fevre v. Le Fevre, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696; Phelps v. Seely, 22 Grat. (Va.) 573; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Van Syckel v. O'Hearn, 50 N. J. Eq. 173, 24 Atl. 1024; White v. Walker, 31 Ill. 422; Lawrence v. Dole, 11 Vt. 549; Hydeville Co. v. Slate Co., 44 Vt. 395; Green v. Wells, 2 Cal. 584; Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462; Herzog v. Sawyer, 61 Md. 344; Dickerson v. Commissioners, 6 Ind. 128, 63 Am. Dec. 373; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13. See, also, Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247. *See "Contracts," Dec. Dig. (Key-No.) § 239; Cent. Dig. § 1124.*

[43] Goss v. Nugent, 5 Barn. & Adol. 65; Brown v. Everhard, 52 Wis. 205, 8 N. W. 725; Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554; Blagborne v. Hunger, 101 Mich. 375, 59 N. W. 657; McNish v. Reynolds, 95 Pa. 483; Allen v. Sowerby, 37 Md. 410; Wiggin v. Goodwin, 63 Me. 389; Aldrich v. Price, 57 Iowa, 151, 9 N. W. 376, 10 N. W. 339; Utley v. Donaldson, 94 U. S. 29, 24 L. Ed. 54; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263; Flanders v. Fay, 40 Vt. 316; Robinson v. Batchelder, 4 N. H. 40; Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328; Deshazo v. Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769; Low v. Forbes, 18 Ill. 568; Jones v. Grantham, 80 Ga. 472, 5 S. E. 764; Lewis v. Say, 151 N. C. 168, 65 S. E. 907; Robinson v. Horner, 176 Ind. 226, 95 N. E. 561; Smith-Wogan Hardware & Implement Co. v. Jos. W. Moon Buggy Co., 26 Okl. 161, 108 Pac. 1103. Contra: Herreshoff v. Misch, 21 R. I. 524, 45 Atl. 145 (cannot be varied). Contra, by statute, in some states, where the oral agreement is unexecuted. Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181. See, also, ante, pp. 490, 492. Even a provision that no modifications shall be made except in writing, may be changed by parol. A. J. Anderson Electric Co. v. Lighting Co. (Tex. Civ. App.) 27 S. W. 504. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

[44] Gorman v. Salisbury, 1 Vern. 240; Wulschner v. Ward, 115 Ind. 219, 17 N. E. 273; Hurley v. Schring, 62 Hun, 621, 17 N. Y. Supp. 7; Buel v. Miller, 4 N. H. 196. As to novation, see ante, p. 84. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

because of inconsistency between it and the original, the better opinion requires a writing. The new contract, resting in parol, would be unenforceable for noncompliance with the statute, and could not discharge the original contract.[45] There are some cases in conflict with this statement.[46] Parol evidence is admissible, however, to prove substantial performance when the performance is completed and accepted, and such performance is a defense by way of accord and satisfaction.[47]

SAME—PROVISIONS FOR DISCHARGE CONTAINED IN THE CONTRACT—CONDITIONS SUBSEQUENT

236. A contract may contain within itself express or implied provisions for its determination under certain circumstances. These provisions are conditions subsequent. Such a discharge may take place by reason of—

(a) The nonfulfillment of a specified term of the contract.

(b) The occurrence of a particular event.

(c) The exercise by one of the parties of an option to determine the contract, the option being given either—

(1) By express provision in the contract, or

(2) By a custom or usage forming part of the contract.[48]

[45] Noble v. Ward, L. R. 2 Exch. 135; Goss v. Lord Nugent, 5 Barn. & Adol. 58; Burns v. Real-Estate Co., 52 Minn. 31, 53 N. W. 1017; Hill v. Blake, 97 N. Y. 216; Hickman v. Haynes, L. R. 10 C. P. 598; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Dana v. Hancock, 30 Vt. 616; Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165; Musselman v. Stoner, 31 Pa. 265; Wilson's Assignee v. Beam (Ky.) 14 S. W. 362; Carpenter v. Galloway, 73 Ind. 418; Rucker v. Harrington, 52 Mo. App. 481; Augusta Southern R. Co. v. Smith & Kilby Co., 106 Ga. 864, 33 S. E. 28. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

[46] Stearns v. Hall, 9 Cush. (Mass.) 31; Cummings v. Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; Negley v. Jeffers, 28 Ohio St. 90; Lee v. Hawks, 68 Miss. 669, 9 South. 828, 13 L. R. A. 633; McClelland v. Rush, 150 Pa. 57, 24 Atl. 354. And see Houston v. Sledge, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487; Johnston v. Trask, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394; Blanchard v. Trim, 38 N. Y. 225; Browne, St. Frauds, § 411; 2 Reed, St. Frauds, § 458. *See "Contracts," Dec. Dig. (Key-No.) § 238; Cent. Dig. §§ 1117, 1123.*

[47] Moore v. Campbell, 10 Exch. 323, per Parke, B.; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; Long v. Hartwell, 34 N. J. Law, 116, 127; Ladd v. King, 1 R. I. 224, 231, 51 Am. Dec. 624; Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554. *See "Evidence," Dec. Dig. (Key-No.) § 465; Cent. Dig. §§ 1784, 1899, 2044, 2065.*

[48] Anson, Cont. (4th Ed.) 263–267.

Discharge on Nonfulfillment of Term

In the first of these three cases—that in which the nonfulfillment of a specified term of the contract gives to one of the parties the option of treating the contract as discharged—we seem to be approaching very near to the subject of the discharge of contract by breach, for this, to, may arise from the nonfulfillment of a term which the parties consider to be vital to the contract. There is, however, this difference between a nonfulfillment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract determinable at the option of one, and a breach, or nonfulfillment not contemplated or provided for by the parties. In the former case the parties have, while in the latter they have not, looked beyond the immediate objects of the contract. In the former case the default which is to constitute a discharge is specified by the agreement of the parties, while in the latter it must always be a question of fact or of construction whether or not the default was in a matter vital to the contract, so as to operate as a discharge by breach. An illustration of this mode of discharge is afforded where a chattel is sold with the understanding that it may be returned if it is not satisfactory, or does not answer the description given by the seller. In a leading case on this point, a horse had been sold under a contract by which it was stipulated that, if it did not comply with a certain warranty, the buyer might return it by a specified time. It did not comply with the warranty, and was returned within the time, but the seller refused to accept it, because it had been injured, though by no fault of the buyer. It was held that the buyer was entitled to return it. "The effect of the contract," it was said, "was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller." [49]

So, where a servant is employed for a specified time to work to the master's satisfaction, the master may have the right to

[49] Head v. Tattersall, L. R. 7 Exch. 7, 14. And see RAY v. THOMPSON, 12 Cush. (Mass.) 281, 59 Am. Dec. 187, Throckmorton Cas. Contracts, 369; Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558; Buswell v. Bicknell, 17 Me. 344, 35 Am. Dec. 262; Schlesinger v. Stratton, 9 R. I. 578; McKinney v. Bradlee, 117 Mass. 321; Robinson v. Fairbanks, 81 Ala. 132, 1 South. 552. Cf. Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 33 L. Ed. 1093. It is otherwise where the injury is caused by the fault of the purchaser. RAY v. THOMPSON, 12 Cush. (Mass.) 281, 59 Am. Dec. 187, Throckmorton Cas. Contracts, 369. If no time is specified within which the option to rescind must be exercised, a reasonable time is implied. Quinn v. Stout, 31 Mo. 160; Hickman v. Shimp, 109 Pa. 16; Washington v. Johnson, 7 Humph. (Tenn.) 468. *See "Sales," Dec. Dig. (Key-No.) § 287; Cent. Dig. §§ 811–816.*

discharge him when he becomes, in good faith, dissatisfied with him.[50]

The law, however, does not favor forfeitures, nor does it incline to such construction of a doubtful contract as will terminate the rights of one of the parties under it. As said in a recent Texas case:[51] "To constitute a condition subsequent upon which a forfeiture may be declared because of a failure of its performance, the language must be clear and the condition must be created by express terms, or by clear implication, and it must be strictly construed."

Occurrence of Specified Event

The parties may introduce into the terms of their contract a provision that the fulfillment of a condition, or the occurrence of an event, shall discharge them both from further liabilities under the contract. Such a condition subsequent is well illustrated by the case of a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond. Another illustration is in case of the excepted risks in a charter party. In a contract of that nature the shipowner agrees with the charterer to make the voyage on the terms expressed in the contract, the act of God, public enemies, fire, collision, and other dangers of the seas, etc., excepted. The occurrence of such an excepted risk releases the shipowner from the strict performance of the contract; and if it should take place while the contract is wholly executory, and frustrate the entire enterprise, the parties are altogether discharged.[52] Another illustration of such conditions is found in contracts with common carriers. Bills of lading generally contain exceptions by which the liability of the carrier to deliver the goods is to cease if their loss or destruction is caused by certain

[50] Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 113 N. W. 575, 12 L. R. A. (N. S.) 403 and note; Mackenzie v. Minis, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723; Frary v. Rubber Co., 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157; Allen v. Compress Co., 101 Ala. 574, 14 South. 362; Magee v. Lumber Co., 78 Minn. 11, 80 N. W. 781; Gwynne v. Hitchner, 66 N. J. Law, 97, 48 Atl. 571; Id., 67 N. J. Law, 654, 52 Atl. 997; Kendall v. West, 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317. And see Crawford v. Publishing Co., 163 N. Y. 404, 57 N. E. 616; post, p. 541. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289; "Master and Servant," Dec. Dig. (Key-No.) § 21; Cent. Dig. §§ 20, 21.*

[51] South Texas Telephone Co. v. Huntington, 104 Tex. 350, 136 S. W. 1053, 138 S. W. 381. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1233–1248.*

[52] Geipel v. Smith, L. R. 7 Q. B. 404; Graves v. The Calvin S. Edwards, 1 C. C. A. 533, 50 Fed. 477. *See "Contracts," Dec. Dig. (Key-No.) §§ 226, 278; Cent. Dig. §§ 1033–1037, 1207–1213.*

perils.[53] A common carrier is said to warrant or insure the safe delivery of goods intrusted to him, but his promise, even without express stipulation, is defeasible upon the occurrence of certain excepted risks, such as the act of God [54] and injuries arising from defects inherent in the thing carried.[55] This limitation of liability is implied in every contract with a common carrier, and the occurrence of the risks exonerates him from liability for loss incurred through their agency.[56]

Discharge Optional with Notice

Again, a continuing contract may contain a provision making it determinable at the option of one of the parties, upon certain terms.[57] Whether, for instance, a contract of employment pro-

[53] Storer v. Gordon, 3 Maule & S. 308; Southern Exp. Co. v. Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102; Haas v. Railroad Co., 81 Ga. 792, 7 S. E. 629; Slater v. Railroad Co., 29 S. C. 96, 6 S. E. 936; Norris v. Railway Co., 23 Fla. 182, 1 South. 475, 11 Am. St. Rep. 355. *See "Carriers," Dec. Dig. (Key-No.) § 112; Cent. Dig. §§ 480–485.*

[54] "By the act of God, is meant any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. The act of God excludes all idea of human agency." Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; McArthur v. Sears, 21 Wend. (N. Y.) 190. Some courts, however, have used the term as synonymous with "inevitable accident." Neal v. Saunderson, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609; Blythe v. Railroad Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403; Crosby v. Fitch, 12 Conn. 410, 419, 31 Am. Dec. 745; Walpole v. Bridges, 5 Blackf. (Ind.) 222. In an English case the court of common pleas held that, to constitute the "act of God," a loss must arise from "such a direct and violent and sudden and irresistible act of nature" as could not be foreseen, or, if foreseen, prevented. Nugent v. Smith, 1 C. P. Div. 19. And see The Niagara v. Cordes, 21 How. 7, 16 L. Ed. 41. The court of appeal reversed the decision, and held that "it is not necessary to prove that it was absolutely impossible for the carrier to prevent it; but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented." Nugent v. Smith, 1 C. P. Div. 441. See, also, Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Nashville & C. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; Palmer v. Railroad Co., 101 Cal. 187, 35 Pac. 630; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695. *See "Contracts," Dec. Dig. (Key-No.) § 119; Cent. Dig. §§ 523–530.*

[55] Clarke v. Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205; Penn v. Railroad Co., 49 N. Y. 204, 10 Am. Rep. 355; Cragin v. Railroad Co., 51 N. Y. 61, 10 Am. Rep. 559; Smith v. Railroad Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166; Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Evans v. Railroad Co., 111 Mass. 142, 15 Am. Rep. 19; Lindsley v. Railroad Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692. *See "Carriers," Dec. Dig. (Key-No.) §§ 120, 149½; Cent. Dig. §§ 486, 651–662.*

[56] Nugent v. Smith, 1 C. P. Div. 423. *See "Carriers," Dec. Dig. (Key-No.) § 120; Cent. Dig. § 486.*

[57] Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383; Bour v. Kimball, 46

vides that it may be terminated by either party on giving a month's notice, and the servant or agent is dismissed on a month's notice, the contract is discharged and not broken.[58] Such terms may be incorporated in contracts by usage.[59] If a continuous contract fixes no time during which it is to last, and no time is fixed by law or by usage, it may be determined at the will of either party by notice.[60] A contract of hiring, for instance, if no time is specified, is generally construed as a hiring at will; and the fact that wages are payable at specified periods does not necessarily show that the hiring was for a specified period.[61] In every contract of hiring, certain provisions for discharge are implied. If the servant proves incompetent, for instance, or if he acts in such a way as to injure the employer's business, or is otherwise guilty of breach of duty, the latter may rightfully discharge him.[62] This, however, is a breach of contract by the servant or agent, and the master or principal is discharged by the breach.

Ill. App. 327. *See "Contracts," Dec. Dig. (Key-No.) § 217; Cent. Dig. §§ 1005–1009.*

[58] Jenkins v. Long, 8 Md. 132. And so it is with any other kind of contract which contains an express provision that it may be terminated at any time on giving notice. Geiger v. Railroad Co., 41 Md. 4; Oregon & W. Mortg. Sav. Bank v. Mortgage Co. (C. C.) 35 Fed. 22; Adriance v. Rutheford, 57 Mich. 170, 23 N. W. 718. *See "Master and Servant," Dec. Dig. (Key-No.) § 21; Cent. Dig. §§ 20, 21.*

[59] Parker v. Ibbetson, 4 C. B. (N. S.) 347. *See "Customs and Usages," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 11–39.*

[60] Coffin v. Landis, 46 Pa. 426; Peacock v. Cummings, Id. 434; Greenburg v. Early, 4 Misc. Rep. 99, 23 N. Y. Supp. 1009; Attrill v. Patterson, 58 Md. 226; Walker v. Denison, 86 Ill. 142. *See "Contracts," Dec. Dig. (Key-No.) § 216; Cent. Dig. §§ 996–1009.*

[61] Babcock & Wilcox Co. v. Moore, 62 Md. 161; McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. 176; Beach v. Mullin, 34 N. J. Law, 343; Tatterson v. Manufacturing Co., 106 Mass. 56; Franklin Min. Co. v. Harris, 24 Mich. 115; Prentiss v. Ledyard, 28 Wis. 131; Haney v. Caldwell, 35 Ark. 156. *See "Master and Servant," Dec. Dig. (Key-No.) § 21; Cent. Dig. §§ 20, 21.*

[62] Keedy v. Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Adams Exp. Co. v. Trego, 35 Md. 47; Leatherberry v. Odell (C. C.) 7 Fed. 641; Callo v. Brouncker, 4 Car. & P. 518; Beeston v. Caller, 2 Car. & P. 607; Newman v. Reagan, 63 Ga. 755; Drayton v. Reid, 5 Daly (N. Y.) 442; Fillieul v. Armstrong, 7 Adol. & E. 557. *See "Master and Servant," Dec. Dig. (Key-No.) § 30; Cent. Dig. §§ 30–36.*

DISCHARGE OF CONTRACT BY PERFORMANCE

237. A contract is discharged by performance—

(a) Where a promise has been given upon an executed consideration, and is performed by the promisor.

(b) Where one promise has been given in consideration of another, and both are performed.[63]

Performance of a contract which amounts to an extinction of the obligation must be distinguished from performance which discharges one, only, of the parties from further liabilities under it. Where a promise has been given upon an executed consideration, the promisee has performed his part in the formation of the contract, and performance of his promise by the promisor discharges the contract. All has been done on both sides that could be required to be done under the contract. Where the contract is wholly executory—that is, where one promise has been given in consideration of another—performance by one party does not discharge the contract, though it discharges him from further liability under it. Each must have done his part, in order that performance may be a discharge of the contract.

Whether or not a contract has been performed, so far as the person performing the contract is concerned, must be answered by reference to the operation of contract, while, in so far as the performance is concerned, it must be answered by reference to the construction of contract.

Substantial Performance

At common law, a strict and literal performance in accordance with the terms of the contract is, as a rule, required.[64] In equity, on the other hand, contracts not capable of literal performance will be decreed with compensation for deficiencies where there is a variance, provided the contract can be performed in substance.[65] Even at law the rule generally prevails that where one of the parties has endeavored in good faith to perform and has substantially performed his contract, and thereby conferred on the

[63] Anson, Cont. (4th Ed.) 270.

[64] Dauchey v. Drake, 85 N. Y. 407; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Harris v. Sharples, 202 Pa. 243, 51 Atl. 965, 58 L. R. A. 214. But there may be performance, within the fair intent and meaning of the contract, if the departure from the letter of the contract is trifling. Drew v. Goodhue, 74 Vt. 436, 52 Atl. 971. *See "Contracts," Dec. Dig. (Key-No.) § 294; Cent. Dig. §§ 1352–1362.*

[65] Eaton, Eq. 558.

other party a substantial benefit, although he has failed to perform in some particulars, he may recover the contract price, less the amount of the damages sustained by the other party by reason of the failure of strict performance."[66]

The rule, it has been said, is based on the theory, "first, that the defects or omissions may be remedied or cured, so that the work will then correspond with the contract, or the other party may be fully compensated in money for the slight damage done him by the failure to fully perform the contract; and, second, that it is unfair and unjust for the one party, who has reaped the benefit in nearly full measure of the other party's labor, to refuse to pay for the work actually done in accordance with the contract."[67]

To justify a recovery on the contract so substantially performed, the omissions or deviations must not be willful;[68] and "they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for."[69] This rule has its most frequent application in building contracts, where the contractor's labor and materials have added value to the owner's land, which the owner must

[66] Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Nolan v. Whitney, 88 N. Y. 648; Blood v. Wilson, 141 Mass. 25, 6 N. E. 362; Pinches v. Lutheran Church, 55 Conn. 183, 10 Atl. 264; Todd v. Huntington, 13 Or. 9, 4 Pac. 295; Katz v. Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Gallagher v. Sharpless, 134 Pa. 134, 19 Atl. 491; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Ashley v. Henahan, 56 Ohio St. 559, 47 N. E. 573; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Philip Hiss Co. v. Pitcairn (C. C.) 107 Fed. 425; Jones & Hotchkiss Co. v. Davenport, 74 Conn. 418, 50 Atl. 1028; Foeller v. Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327; Mitchell & Pumphrey v. Caplinger, 97 Ark. 278, 133 S. W. 1032. Cf. Ætna Iron & Steel Works v. Kossuth County, 79 Iowa, 40, 44 N. W. 215. *See "Contracts," Dec. Dig. (Key-No.) § 294; Cent. Dig. §§ 1352–1362.*

[67] Dickinson v. Sheldon, 146 App. Div. 144, 130 N. Y. Supp. 889, 892, per McLennon, P. J. *See "Contracts," Dec. Dig. (Key-No.) § 294; Cent. Dig. §§ 1352–1362.*

[68] Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410. *See "Contracts," Dec. Dig. (Key-No.) § 294; Cent. Dig. §§ 1352–1362.*

[69] Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52. See, also, Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 Atl. 36; Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017; Marchant v. Hayes, 117 Cal. 669, 49 Pac. 840; Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Cornish Curtis & Greene Co. v. Association, 82 Minn. 215, 84 N. W. 724; Harris v. Sharples, 202 Pa. 243, 51 Atl. 965, 58 L. R. A. 214; Dickinson v. Sheldon, 146 App. Div. 144, 130 N. Y. Supp. 889; Hoglund v. Sortedahl, 101 Minn. 359, 112 N. W. 408. But see Danforth v. Freeman, 69 N. H. 466, 43 Atl. 621. *See "Contracts," Dec. Dig. (Key-No.) § 294; Cent. Dig. §§ 1352–1362.*

necessarily retain and have the benefit of. It seems that in such cases, where there is a material breach, the liability is quasi contractual, the plaintiff being allowed to recover because of the unjust enrichment of the other party, and consequently that the amount of recovery should be, not necessarily the contract price less the damages resulting from failure of strict performance, but, as has recently been held in Massachusetts, the additional value to the land of the defendant by reason of the plaintiff's labor and materials, and that the burden is on the plaintiff to show a benefit, and its amount.[70] In many cases, however, this value can be ascertained by deducting from the contract price the cost of completing the building or article according to the specifications.[71]

Where there are defects not remediable, there should be added such further sum as will measure the actual diminished value of the structure because of such defects.[72]

Performance to Satisfaction of Promisor

Where it is a term of the contract that the performance shall be satisfactory to the other party, it is a question of interpretation whether his obligation is conditional upon actual satisfaction or reasonable satisfaction. In contracts in which the subject-matter involves the personal taste or judgment of the promisor,[73] for example, a suit of clothes,[74] a picture,[75] a play, or other literary production,[76] the courts construe the contract as making the promisor the sole judge; and although the compensation of the

[70] Gillis v. Cobe, 177 Mass. 584, 59 N. E. 455. *See "Contracts," Dec. Dig. (Key-No.) § 295; Cent. Dig. §§ 1352–1362.*

[71] See Kelly v. Town of Bradford, 83 Vt. 35; Pinches v. Lutheran Church, 53 Conn. 185, 10 Atl. 264; Norwood v. Lathrop, 178 Mass. 208, 59 N. E. 650. *See "Contracts," Dec. Dig. (Key-No.) § 295; Cent. Dig. §§ 1352–1362.*

[72] Foeller v. Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327. *See "Contracts," Dec. Dig. (Key-No.) § 295; Cent. Dig. §§ 1352–1362.*

[73] Andrews v. Belfield, 2 C. B. (N. S.) 779; McCarren v. McNulty, 7 Gray (Mass.) 139; McClure v. Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 357; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Housding v. Solomon, 127 Mich. 654, 87 N. W. 57. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[74] Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[75] Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446; PENNINGTON v. HOWLAND, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774, Thockmorton Cas. Contracts, 370. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[76] Haven v. Russell (Sup.) 34 N. Y. Supp. 292; Walker v. Edward Thompson Co., 37 App. Div. 536, 56 N. Y. Supp. 326. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

promisee may thus be dependent on the promisor, who unreasonably withholds his satisfaction, the promisee cannot be relieved from the contract into which he has voluntarily entered. The tendency of the courts is perhaps to construe all contracts providing for the satisfaction of the promisor in the same manner.[77] The promisor must, however, act in good faith.[78] On the other hand, the parties may agree that the satisfactoriness may be determined by the mind of a reasonable man, and not by the mere taste or liking of the promisor;[79] and where the subject-matter of the contract involves such considerations as salability, operative fitness, and mechanical utility, rather than personal feeling or taste, many courts construe the satisfaction contemplated as that of a reasonable man.[80] And some cases even lay down the broad rule that where a contract is to be performed to the satisfaction of one of the parties, the meaning necessarily is that it must be done to the satisfaction of the mind of a reasonable man.[81] It seems, however, that the question in each case should be the determination of the intention of the parties as evinced by the

[77] Seeley v. Welles, 120 Pa. 69, 13 Atl. 736; Adams Radiator & Boiler Works v. Schnader, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep. 803; Silsby Mfg. Co. v. Town of Chico (C. C.) 24 Fed. 893; Campbell Printing-Press Co. v. Thorp (C. C.) 36 Fed. 414, 1 L. R. A. 645; Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; McCormick Harvesting Mach. Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; Exhaust Ventilator Co. v. Railroad Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; Blaine v. Publishers George Knapp & Co., 140 Mo. 241, 41 S. W. 787; Williams Mfg. Co. v. Brass Co., 173 Mass. 356, 53 N. E. 862. Contract for personal services. Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 113 N. W. 575, 12 L. R. A. (N. S.) 403 and note; Mackenzie v. Minis, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[78] Andrews v. Belfield, 2 C. B. N. S. 779; Stodhard v. Lee, 3 Best & S. 364, 32 L. J. Q. B. N. S. 75; Silsby Mfg. Co. v. Town of Chico (C. C.) 24 Fed. 893; Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; Electric Lighting Co. of Mobile v. Elder, 115 Ala. 138, 21 South. 983; Crawford v. Mail & Exp. Pub. Co., 9 App. Div. 481, 41 N. Y. Supp. 325. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[79] Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[80] Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 908, 45 Am. Rep. 57; Schliess v. City of Grand Rapids, 131 Mich. 52, 90 N. W. 700. And see Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[81] Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Richison v. Mead, 11 S. D. 639, 80 N. W. 131. And see Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

particular contract, and that no invariable rules of interpretation can be laid down.[82]

Time of Performance

Where no time for performance is fixed by the contract, a reasonable time is implied.[83] Where a time is specified, the question arises whether it is of the essence of the contract or not. This question must be answered by the rules of construction which we have already considered.[84] If time is of the essence, a failure by one party to perform within the time limited entitles the other party to be discharged from the contract, and a performance after the time fixed does not bind the other party unless he waives the breach, and thereby, in effect, makes a new contract taking the place of the old one. And even where time is not of the essence of a contract, a party failing to perform his work within the time specified is liable in damages for the delay.[85]

Where a particular day is fixed upon for performance, or performance is required within a certain time, the contract may be performed at any time during the day or during the last day.[86]

Effect of Failure of Performance

If there is a failure of performance, partial or total, then the contract is broken. Whether the breach amounts to a discharge is a question which we shall hereafter discuss.[87]

[82] Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Magee v. Lumber Co., 78 Minn. 11, 80 N. W. 781; Electric Lighting Co. of Mobile v. Elder, 115 Ala. 138, 21 South. 983; McNeil v. Armstrong, 81 Fed. 943, 27 C. C. A. 16; City of Elizabeth v. Fitzgerald, 114 Fed. 547, 52 C. C. A. 321. *See "Contracts," Dec. Dig. (Key-No.) § 282; Cent. Dig. §§ 1284–1289.*

[83] Ante, p. 512. Where the act to be done is the payment of money, the presumption is that it is to be paid on demand. Warren v. Wheeler, 8 Metc. (Mass.) 97. *See "Contracts," Dec. Dig. (Key-No.) § 212; Cent. Dig. §§ 944–955.*

[84] Ante, p. 512.

[85] BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO., 52 Fed. 700, 3 C. C. A. 248, Throckmorton Cas. Contracts, 350; Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60, Ann. Cas. 1913C, 876. *See "Contracts," Dec. Dig. (Key-No.) § 299; Cent. Dig. §§ 1372–1381.*

[86] Leake, Cont. 441; Startup v. Macdonald, 6 Man. & G. 593. *See "Contracts," Dec. Dig. (Key-No.) § 213; Cent. Dig. §§ 957–977; "Time," Dec. Dig. (Key-No.) § 11; Cent. Dig. § 53.*

[87] See post, p. 556 et seq.

SAME—PAYMENT

238. Payment consists in the performance of a contract—
(a) By the delivery of money, or
(b) By the delivery of negotiable instruments conferring the right to receive money, in which latter case the payee may take the instrument—
(1) In discharge of his right absolutely, or
(2) Subject to a condition (which, in most jurisdictions, will be presumed, in the absence of expressions to the contrary) that, if not paid when due, the payee reverts to his original rights, either to performance of the contract or satisfaction for its breach.[88]

If the liability of a party to a contract consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges him by the performance of his agreement. If, again, a person who is liable to perform certain acts under his contract wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with the other party to accept the proposed payment in lieu of such performance as he is entitled to under the contract.[89] In such a case the payment is a performance of the substituted agreement, and a discharge of the contract. Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action has accrued to the other, the obligation formed by this right of action may be discharged by an accord and satisfaction; that is, an agreement, the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.[90] Payment, then, is the performance of a contract, whether it be a performance of an original or of a substituted contract, or of a contract in which payment is the consideration for a forbearance to exercise a right of action which may have arisen from the breach of an agreement.[91]

[88] Anson, Cont. (4th Ed.) 272–274.
[89] Ante, p. 526.
[90] Post, p. 615.
[91] In Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. App. 300, 126 S. W. 996, it is said per Nixon, P. J.: "In order to constitute payment as that word is used in law, there must be (1) a delivery; (2) by the debtor or his representatives; (3) to the creditor or his representatives; (4) of money or something accepted by the creditor as the equivalent thereof; (5) with the intention on the part of the debtor to pay the debt in whole or in part; and

If a tender is made by the debtor of money or other thing as in full satisfaction of his debt, the acceptance by the creditor of that which is tendered constitutes a complete discharge of the debt. The creditor may not apply the amount received and recover a balance claimed to be due.[92] Unless otherwise agreed between the parties, payment may be made only in money.[93] With the consent of the creditor, however, the debtor may discharge his obligation by the delivery of anything of value.[94]

If counterfeit coins, bank notes, or other moneys are given in performance of a promise to pay money, even though they are believed to be good, there is no payment. The promisee may treat it as a nullity.[95] But a coin issued by authority of law to circulate as money is not deprived of its legal tender quality merely by being worn in the process of circulation, nor when bruised or cracked, so long as it is not appreciably diminished in weight, and retains the evidence of its being genuine.[96] So payment by a rare coin is good, if it is genuine and distinguishable as such.[97]

(6) accepted as payment by the creditor." *See "Contracts," Dec. Dig. (Key-No.) § 308; Cent. Dig. §§ 1463, 1464.*

[92] St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. Supp. 946 [affirmed 186 N. Y. 563, 79 N. E. 1115]; Nassoiy v. Tomlinson, 148 N. Y. 328, 42 N. E. 715, 51 Am. St. Rep. 695. *See "Contracts," Dec. Dig. (Key-No.) § 304; Cent. Dig. §§ 1457–1464; "Accord and Satisfaction," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 75–82.*

[93] First Nat. Bank of Blakely v. Davis, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134. Payment made to a solvent bank by a check drawn upon it is equivalent to payment in money and is binding upon a principal for whom the bank acted as agent. Pollok Bros. v. Niall-Herin Co., 137 Ga. 23, 72 S. E. 415, 35 L. R. A. (N. S.) 13. *See "Payment," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 34–53.*

[94] First Nat. Bank of Blakely v. Davis, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134. *See "Payment," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 34–53.*

[95] Markle v. Hatfield, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446; Young v. Adams, 6 Mass. 182; Gilman v. Peck, 11 Vt. 516, 34 Am. Dec. 702; Blalock v. Phillips, 38 Ga. 216; United States v. Morgan, 11 How. 154, 13 L. Ed. 643; First Nat. Bank of Athens v. Buchanan, 87 Tenn. 32, 9 S. W. 202, 1 L. R. A. 199, 10 Am. St. Rep. 617. He may be estopped, however, if he was guilty of negligence in receiving the counterfeit, or if, after discovery, he delays for an unreasonable time to return it or notify the debtor. Thomas v. Todd, 6 Hill (N. Y.) 340; Pindall's Ex'rs v. Bank, 7 Leigh (Va.) 617; Rick v. Kelly, 30 Pa. 527; Wingate v. Neidlinger, 50 Ind. 520; Union Nat. Bank v. Baldenwick, 45 Ill. 375; Atwood v. Cornwall, 28 Mich. 336, 15 Am. Rep. 219. *See "Payment," Dec. Dig. (Key-No.) § 11; Cent. Dig. § 58.*

[96] Cincinnati Northern Traction Co. v. Rosnagle, 84 Ohio St. 310, 95 N. E. 884, 35 L. R. A. (N. S.) 1030, Ann. Cas. 1912C, 639. *See "Payment," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 42–61.*

[97] Atlanta Consolidated St. Ry. Co. v. Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824. *See "Payment," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 42–61.*

Where, for the purpose of making a payment, money is sent by the debtor to the creditor by mail, and is lost before it reaches him, it will discharge the debt, and the loss will fall on the creditor, if the remittance was in the manner authorized by him, but not otherwise.[98]

Payment by Negotiable or Nonnegotiable Instrument

A negotiable instrument may be given for a sum due, either liquidated or unliquidated. It is in effect a substitution of a new agreement for the old one, but it does not necessarily discharge the old agreement. Where such a payment is made, either in performance of an existing contract or in satisfaction of a broken contract, it may discharge the party making it, either absolutely or conditionally. Whether it has the one or the other of these effects depends upon the intention of the parties.[99] If the instrument is accepted by the party entitled to payment, and in consideration thereof he promises, either expressly or impliedly, to discharge the other party altogether from his existing liabilities, the discharge of the original contract is absolute. The payee relies then upon the rights conferred by the instrument, and, if it is not paid, he must sue on it. He cannot sue on the original contract.[1] On the other hand, the instrument may be taken as a

[98] Palmer v. Insurance Co., 84 N. Y. 63; Gurney v. Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58; Kenyon v. Association, 122 N. Y. 247, 25 N. E. 299; Burr v. Sickles, 17 Ark. 428, 65 Am. Dec. 437; Williams v. Carpenter, 86 Ala. 9, 76 Am. Dec. 316; Gross v. Criss, 3 Grat. (Va.) 262. *See "Payment," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 18.*

[99] CHELTENHAM STONE & GRAVEL CO. v. GATES IRON WORKS, 124 Ill. 623, 16 N. E. 923, Throckmorton Cas. Contracts, 374; Flanagin v. Hambleton, 54 Md. 222; Combination Steel & Iron Co. v. Railway Co., 47 Minn. 207, 49 N. W. 744; Kirkpatrick v. Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; National Park Bank v. Levy, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475; Case Mfg. Co. v. Soxman, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019; Craddock v. Dwight, 85 Mich. 587, 48 N. W. 644; Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558; note 2, infra. *See "Payment," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 63–85.*

[1] Sard v. Rhodes, 1 Mees. & W. 153; Wolf v. Fink, 1 Pa. 435, 44 Am. Dec. 141; Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604; Bausman v. Guarantee Co., 47 Minn. 377, 50 N. W. 496; Kirkpatrick v. Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; Susquehanna Fertilizer Co. v. White, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186; Costar v. Davies, 8 Ark. 213, 46 Am. Dec. 311; McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201 (acceptance and cashing of check by agent of creditor). Where a creditor procures the certification of a check delivered to him by his debtor, it constitutes a payment to the amount of the check. St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. Supp. 946 [affirmed

conditional discharge only; and in England and in most of our states it is presumed to have been so taken unless there is something to show a contrary intention.[2] In such a case the position of the parties is that the payee, having certain rights against the other party under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of his right of action, and the other party, in giving the instrument, has thus far satisfied the payee's claim; but, if the instrument is not paid at maturity, the consideration for the payee's promise fails, and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally is merely to suspend the right to sue on the original contract until the instrument matures, and when it matures, and is not paid, to give the right to sue either on it or on the original con-

186 N. Y. 563, 79 N. E. 1115]. And a creditor's failure to use due diligence in presenting a check for payment operates as payment to the extent that the debtor is prejudiced thereby. Mankey v. Hoyt, 27 S. D. 561, 132 N. W. 230; R. H. Herron Co. v. Mawby, 5 Cal. App. 39, 89 Pac. 872. *See "Payment," Dec. Dig. (Key-No.) §§ 16–23; Cent. Dig. §§ 63–90.*

[2] CHELTENHAM STONE & GRAVEL CO. v. GATES IRON WORKS, 124 Ill. 623, 16 N. E. 923, Throckmorton Cas. Contracts, 374; Sayer v. Wagstaff, 5 Beav. 423; Robinson v. Read, 9 Barn. & C. 449; Feldman v. Beier, 78 N. Y. 293; The Kimball, 3 Wall. 37, 18 L. Ed. 50; Bill v. Porter, 9 Conn. 23; Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 S. E. 748; Morriss v. Harveys, 75 Va. 726; Sayre v. King, 17 W. Va. 562; Shepherd v. Busch, 154 Pa. 149, 26 Atl. 363, 35 Am. St. Rep. 815; Sebastian May Co. v. Codd, 77 Md. 293, 26 Atl. 316; Akin v. Peters, 45 Ark. 313; Belleville Sav. Bank v. Bornman, 124 Ill. 200, 16 N. E. 210; Case v. Seass, 44 Mich. 195, 6 N. W. 227; First Nat. Bank v. Case, 63 Wis. 504, 22 N. W. 833; A. Leschen & Sons Rope Co. v. Mayflower S. M. & R. Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1, and monographic note; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. App. 300, 126 S. W. 996. Giving receipt in full is not sufficient to rebut presumption that payment was conditional. Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279. But the presumption is reversed where the note of a third person is given without guaranty or indorsement, on account of a contemporaneous debt. Whitbeck v. Van Ness, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; Noel v. Murray, 13 N. Y. 167; Deford v. Dryden, 46 Md. 248; Bicknall v. Waterman, 5 R. I. 43. And see Ford v. Mitchell, 15 Wis. 304. But see Devlin v. Chamblin, 6 Minn. 468 (Gil. 325); McIntyre v. Kennedy, 29 Pa. 448. In Massachusetts and several other states the presumption is that the instrument was intended to be accepted as an absolute discharge. Dodge v. Emerson, 131 Mass. 467; Mehan v. Thompson, 71 Me. 492; Mason v. Douglas, 6 Ind. App. 558, 33 N. E. 1009; Smith v. Bettger, 68 Ind. 254, 34 Am. Rep. 256; Teal v. Spangler, 72 Ind. 380; Nixon v. Beard, 111 Ind. 137, 12 N. E. 131; Hadley v. Bordo, 62 Vt. 285, 19 Atl. 476. These various presumptions may be rebutted by evidence of a different intention. Norton, Bills & N. (3d Ed.) 19. *See "Payment," Dec. Dig. (Key-No.) §§ 16–23; Cent. Dig. §§ 63–90.*

tract.[3] The agreement is defeasible upon condition subsequent; that is, upon nonpayment of the instrument when due.

Payment, then, consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed, in the absence of expressions to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract, or rights to satisfaction for the breach of one.[4]

Application of Payments

Where a person owes several debts to another, or owes on an account consisting of several different items, and makes a part payment, the question arises as to which debt is discharged. As a rule, the debtor has a right to say which debt he will pay, and he may show his intention in this respect by his conduct, or it may otherwise be inferred from the circumstances.[5] If the creditor receives the payment, he is bound to apply it as expressly or impliedly directed.[6]

If the debtor does not direct the application, at the time of the

[3] Sayer v. Wagstaff, 5 Beav. 423; Happy v. Mosher, 48 N. Y. 313; Hall v. Richardson, 16 Md. 396, 77 Am. Dec. 303; Lupton v. Freeman, 82 Mich. 638, 46 N. W. 1042; Morrison v. Smith, 81 Ill. 221; Fry v. Patterson, 49 N. J. Law, 6, 12, 10 Atl. 390; Hays v. McClurg, 4 Watts (Pa.) 452; Barnet v. Smith, 30 N. H. 256, 64 Am. Dec. 290. See, also, the cases cited in note 2, supra. *See "Payment," Dec. Dig. (Key-No.) §§ 16–23; Cent. Dig. §§ 63–90.*

[4] Robinson v. Read, 9 Barn. & C. 449; Sayer v. Wagstaff, 5 Beav. 415. *See "Payment," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1, 3, 4, 24.*

[5] Stone v. Seymour, 15 Wend. (N. Y.) 19; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384; Fowke v. Bowie, 4 Har. & J. (Md.) 566; Hansen v. Rounsavell, 74 Ill. 238; Stewart v. Keith, 12 Pa. 238; Sawyer v. Tappan, 14 N. H. 352; Cavanagh v. Marble, 80 Conn. 389, 68 Atl. 853, 15 L. R. A. (N. S.) 127. *See "Payment," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 99–103, 128.*

[6] Patty v. Milne, 16 Wend. (N. Y.) 557; Miln v. Patty, 22 Wend. (N. Y.) 538; Ellis v. Mason, 32 S. C. 277, 10 S. E. 1069; Washington Natural Gas Co. v. Johnson, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Atkinson v. Cox, 54 Ark. 444, 16 S. W. 124; Stewart v. Hopkins, 30 Ohio St. 502; Wetherell v. Jay, 40 Me. 325; Champenois v. Fort, 45 Miss. 355; Runyan v. Latham, 27 N. C. 551; Benson v. Reinshagen, 75 N. J. Eq. 358, 72 Atl. 954 (although the creditor does not assent to such application). Cf. Flarsheim v. Brestrup, 43 Minn. 298, 45 N. W. 438. *See "Payment," Dec. Dig. (Key-No.) § 38; Cent. Dig. §§ 99–103, 128.*

payment,[7] the creditor, as a rule, may apply it as he may see fit.[8] He may apply it, for instance, to a debt which is barred by the statute of limitations, in preference to another which is not barred.[9] Having once made the application, he cannot change it without the debtor's consent.[10]

If neither party makes an appropriation of the payment, the law will apply it. According to the civil law, the presumable intention of the debtor was resorted to as the rule to determine the application, and, in the absence of express declaration by either party, the payment was applied in the way that would be most beneficial to the debtor. "The payment was consequently

[7] Pearce v. Walker, 103 Ala. 250, 15 South. 568. *See "Payment," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 104–114.*

[8] Mayor, etc., of Alexandria v. Patten, 4 Cranch, 317, 2 L. Ed. 633; Harding v. Tifft, 75 N. Y. 461; First Nat. Bank of Fair Haven v. Johnson, 65 Vt. 382, 26 Atl. 634; Whitaker v. Groover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300; Case v. Fant, 53 Fed. 41, 3 C. C. A. 418; Henry Bill Pub. Co. v. Utley, 155 Mass. 366, 29 N. E. 635; Lee v. Early, 44 Md. 80; Senter v. Williams (Ark.) 17 S. W. 1029; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516; Howard v. McCall, 21 Grat. (Va.) 205; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 74; Byrnes v. Claffey, 69 Cal. 120, 10 Pac. 321; Koch v. Roth, 150 Ill. 212, 37 N. E. 317. The creditor cannot, without the debtor's consent, apply the payment to an illegal claim, Anderson v. Griffith, 51 Or. 116, 93 Pac. 934; Phillips v. Moses, 65 Me. 70; Pickett v. Bank, 32 Ark. 346; McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Caldwell v. Wentworth, 14 N. H. 431; Bancroft v. Dumas, 21 Vt. 456; Rohan v. Hanson, 11 Cush. (Mass.) 44; Kidder v. Norris, 18 N. H. 532; unless the debtor consents, Brown v. Burns, 67 Me. 535; Feldman v. Gamble, 26 N. J. Eq. 494. But he may apply it to a debt which is merely unenforceable, and not illegal. Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109; Ayer v. Hawkins, 19 Vt. 26; Murphy v. Webber, 61 Me. 478. He cannot apply it to a debt not yet due. Heard v. Pulaski, 80 Ala. 502, 2 South. 343; Bobe's Heirs v. Stickney, 36 Ala. 482. May apply it to either a joint or an individual note of the same debtor. McBride v. Noble, 40 Colo. 372, 90 Pac. 1037, 13 Ann. Cas. 1202. The application must be made within a reasonable time, or it will be applied by law. Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691. *See "Payment," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 104–114.*

[9] Jackson v. Burke, 1 Dill. 311, Fed. Cas. No. 7,133; Ayer v. Hawkins, 19 Vt. 26; Williams v. Griffith, 5 Mees. & W. 300; Waugh v. Cope, 6 Mees. & W. 824; Murphy v. Webber, 61 Me. 478; Pond v. Williams, 1 Gray (Mass.) 630; Ramsay v. Warner, 97 Mass. 8; Beck v. Haas, 31 Mo. App. 180. But see Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516. *See "Payment," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 104–114.*

[10] Offutt v. King, 1 MacArthur (D. C.) 312; Pearce v. Walker, 103 Ala. 250, 15 South. 568; Cremer v. Higginson, 1 Mason, 337, Fed. Cas. No. 3,383; McMaster v. Merrick, 41 Mich. 505, 2 N. W. 895. Nor can the creditor be compelled to change the application. Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 74; Seymour v. Marvin, 11 Barb. (N. Y.) 80. *See "Payment," Dec. Dig. (Key-No.) § 39; Cent. Dig. §§ 104–114.*

applied to the most burdensome debt—to one that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which had been first contracted." [11] This rule has been adopted in a number of cases both in England and in this country. In a well-considered New York case the rule was approved after a full review of the authorities, and a payment was applied to a mortgage and a judgment debt in preference to an account, because the former would bear most heavily on the debtor.[12] Many of the courts, on the other hand, have adopted a rule to some extent directly opposed to the civil-law rule. "If the application is made by neither party," it has been said by the supreme court of the United States, "it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It cannot be conceded that this application is to be made in a manner most advantageous to the debtor. * * * It would seem reasonable that an equitable application should be made; and, it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." In this case the payment was applied to other demands rather than to a judgment debt, on the ground that the former were not so well secured.[13] Probably most of the courts in this country follow the rule just stated, though with some qualification. It is very generally said that an equitable application will be made; that is,

[11] Devaynes v. Noble (Clayton's Case) 1 Mer. 572, 606. *See "Payment," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 115–126.*

[12] Pattison v. Hull, 9 Cow. (N. Y.) 747. And see Bacon v. Brown, 1 Bibb (Ky.) 334, 4 Am. Dec. 640; Jones v. Benedict, 83 N. Y. 79; Heyward v. Lomax, 1 Vern. 24; Prowse v. Worthinge, 2 Brown & G. 107; Neal v. Allison, 50 Miss. 175; Gwinn v. Whitaker's Adm'x, 1 Har. & J. (Md.) 754; Dorsey v. Gassaway, 2 Har. & J. (Md.) 402, 3 Am. Dec. 557; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Robinson v. Doolittle, 12 Vt. 246; Moore v. Kiff, 78 Pa. 96; Barrett v. Sipp, 50 Ind. App. 304, 98 N. E. 310. *See "Payment," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 115–126.*

[13] Field v. Holland, 6 Cranch, 27, 3 L. Ed. 136. And see Burks v. Albert, 4 J. J. Marsh. (Ky.) 97, 20 Am. Dec. 209; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795; The D. B. Steelman (D. C.) 48 Fed. 580; Stamford Bank v. Benedict, 15 Conn. 437; Hilton v. Burley, 2 N. H. 193; Cain v. Vogh, 138 Iowa, 631, 116 N. W. 786, 128 Am. St. Rep. 216. In a later case, under the same rule (the rule of equitable application), the payments were so applied as to operate beneficially to the sureties of the debtor, and against the creditor. United States v. Kirkpatrick, 9 Wheat. 737, 6 L. Ed. 199. If the money paid is the proceeds of a security given for one debt, it will be applied in payment of that debt in preference to an unsecured debt. Lee v. Manley, 154 N. C. 244, 70 S. E. 885. *See "Payment," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 115–126.*

that the payment will be applied according to the justice of the particular case, in view of all the circumstances.[14] Such a rule is not very definite. Is it more equitable to give effect to the civil-law rule, and apply the payment as would be most beneficial to the debtor, or to follow the opposite rule, and consider the creditor's interests? The Minnesota court, in stating the rule, has thus qualified it: "It is true that, where the parties have not made any specific application of payments, courts will make it according to the justice and equity of the case; but in doing so they are governed by certain general and established rules, and are not at liberty to adopt their own notions of what may be just and equitable in each particular case."[15] One of these rules is that, where there is but one continuous account of several items, "the payments will be applied on the account according to the priority of time—that is, the first item on the debit side is discharged or reduced by the first item on the credit side;"[16] and so, where there are several debts of equal dignity, a payment will generally be applied to the oldest.[17] As we have seen, when we get beyond this, there is a conflict of opinion.[18]

[14] Smith v. Loyd, 11 Leigh (Va.) 512, 37 Am. Dec. 621; Stone v. Seymour, 15 Wend. (N. Y.) 19; White v. Trumbull, 15 N. J. Law, 314, 29 Am. Dec. 687; Allen v. Culver, 3 Denio (N. Y.) 284; Pierce v. Knight, 31 Vt. 701; Crompton v. Pratt, 105 Mass. 255. *See "Payment," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 115–126.*

[15] Hersey v. Bennett, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271. And see Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597; Bobe's Heirs v. Stickney, 36 Ala. 482. *See "Payment," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 115–126.*

[16] Hersey v. Bennett, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271. And see Peale v. Grossman, 70 W. Va. 1, 73 S. E. 46, Ann. Cas. 1913C, 1373. *See "Payment," Dec. Dig. (Key-No.) § 41; Cent. Dig. §§ 115–126.*

[17] Devaynes v. Noble (Clayton's Case), 1 Mer. 572; Hersey v. Bennett, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271; Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597; Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153; Pierce v. Knight, 31 Vt. 701; Crompton v. Pratt, 105 Mass. 255; Smith v. Loyd, 11 Leigh (Va.) 512, 37 Am. Dec. 621; Hill v. Robbins, 22 Mich. 475; Winnebago Mills v. Travis, 56 Minn. 480, 58 N. W. 36; Cushing v. Wyman, 44 Me. 121; Fairchild v. Holly, 10 Conn. 175; Truscott v. King, 6 N. Y. 147; Jones v. United States, 7 How. 681, 12 L. Ed. 870; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199; Emery v. Tichout, 13 Vt. 15; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427; Sternberger v. Gowdy, 93 Ky. 146, 19 S. W. 186; Sprague v. Hazenwinkle, 53 Ill. 419. In Kansas this rule yields to the rule that a payment will be applied to an unsecured rather than to a secured debt. State v. United States Fidelity & Guaranty Co., 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865. *See "Payment," Dec. Dig. (Key-No.) § 43; Cent. Dig. § 122.*

[18] Payment will be applied in extinguishment of a certain, rather than a contingent, liability (President, etc., of Niagara Bank v. Rosevelt, 9 Cow. [N. Y.] 409; President, etc., of Bank of Portland v. Brown, 22 Me. 295), and to

Where a partial payment on an interest-bearing debt exceeds the interest due, it must be applied first in discharge of the interest and the remainder in reduction of the principal; and if the payment is less than the interest, it is to be applied on the interest, but the remainder of interest is not to increase the principal.[19]

SAME—TENDER

239. Tender is an offer or attempt to perform, and may be either—

(a) An offer to do something promised, in which case the offer, and its refusal by the promisee, discharge the promisor from the contract.

(b) An offer to pay something promised, in which case the offer, and its refusal by the promisee, do not discharge the debt, but prevent the promisee from recovering more than the amount tendered, and in an action by the promisee entitle the promisor to recover the costs of his defense.[20]

"Tender" is an attempted performance. The word is applied to performance of two kinds: (1) To performance of a promise to do something; and (2) to performance of a promise to pay something,—and the effect of the attempt at performance in the two cases is different. In both cases the performance is frustrated by the act of the party for whom it is to take place.

Where, in a contract for the sale of goods, the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.[21] Where, however, the performance due consists in the payment of a sum of money, a tender by the debtor, although it

extinguish an existing debt, rather than a debt not yet due (Baker v. Stackpoole, 9 Cow. [N. Y.] 420, 18 Am. Dec. 508; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474; Heard v. Pulaski, 80 Ala. 502, 2 South. 343; Bobe's Heirs v. Stickney, 36 Ala. 482), although the debt not due was the first contracted (Briggs v. Steel, 91 Ark. 458, 121 S. W. 754). *See "Payment," Dec. Dig. (Key-No.) § 43; Cent. Dig. § 122.*

[19] Christie v. Scott, 77 Kan. 257, 94 Pac. 214. *See "Payment," Dec. Dig. (Key-No.) § 42; Cent. Dig. § 121.*

[20] Anson, Cont. (4th Ed.) 274, 275.

[21] Startup v. Macdonald, 6 Man. & G. 593; Benj. Sales, 363; Lamb v. Lathrop, 13 Wend. (N. Y.) 95, 27 Am. Dec. 174; Phelps v. Hubbard, 51 Vt. 489; Oelrichs v. Artz, 21 Md. 524; Berry v. Nall, 54 Ala. 446; Mitchell v. Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128. *See "Sales," Dec. Dig. (Key-No.) § 153; Cent. Dig. §§ 358–366.*

may constitute a good defense to an action by the creditor, does not discharge the debt.[22] If the creditor will not take the money when it is due and is tendered him, he puts himself at a disadvantage if he should attempt to recover it by action. While the debt is not discharged, the running of interest is stopped, and the creditor loses the right to any lien or other benefit incidental or accessory to the debt.[23] The debtor, to defend successfully by pleading the tender, must continue always ready and willing to pay the debt, or, as it is said, the tender must be kept good,[24] and when he is sued, and pleads the tender, he must, in most jurisdictions, pay the money into court.[25] If the plea is sustained, the creditor gets nothing but what was originally tendered him, and the debtor gets judgment for his costs, so that he is placed, as nearly as can be, in as good a position as he held at the time of the tender.[26] A tender and payment of money into court, even if it is not accepted, operates as an absolute transfer of the money to the creditor.[27] Even if the judgment is for a less sum, or is for the debtor, the title to the money has passed to the creditor, and the court may not make an order in the same action for the retransfer of the title. Relief from mistake or fraud may be had, if at all, only in an independent action brought for the purpose.[28]

Tender, to be a valid performance to this extent, must observe

[22] Dixon v. Clarke, 5 C. B. 376. *See "Tender," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 59–67.*

[23] Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Murray v. O'Brien, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. *See "Tender," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 59–67.*

[24] Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678. *See "Tender," Dec. Dig. (Key-No.) § 18; Cent. Dig. §§ 55–58.*

[25] Dixon v. Clarke, 5 C. B. 376; Aulger v. Clay, 109 Ill. 487; Illinois v. Railroad Co. (C. C.) 33 Fed. 730; Rice v. Kahn, 70 Wis. 323, 35 N. W. 465; Becker v. Boon, 61 N. Y. 317; Taylor v. Railroad Co., 119 N. Y. 561, 23 N. E. 1106; Columbian Bldg. Ass'n of East Baltimore No. 4 v. Crump, 42 Md. 192; Bissell v. Heyward, 96 U. S. 580, 24 L. Ed. 678; Roberts v. White, 146 Mass. 256, 15 N. E. 568; Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202. While at law the rule that a tender must be kept good by payment into court is well-nigh universal, in equity this will not be required where it would work injustice to the debtor or give the creditor an unconscionable advantage. Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Murray v. O'Brien, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. *See "Tender," Dec. Dig. (Key-No.) § 18; Cent. Dig. §§ 55–58.*

[26] Cornell v. Green, 10 Serg. & R. (Pa.) 14. *See "Tender," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 59–67; "Costs," Cent. Dig. § 146.*

[27] Mann v. Sprout, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561, 7 Ann. Cas. 95. *See "Tender," Dec. Dig. (Key-No.) § 26; Cent. Dig. §§ 88–95.*

[28] Mann v. Sprout, supra. *See "Tender," Dec. Dig. (Key-No.) §§ 26, 27; Cent. Dig. §§ 88–93.*

exactly any special terms which the contract may contain as to time, place, and mode of payment.[29] Further than this, the tender must be an offer of money produced, or at least made accessible to the creditor.[30] Tender of a check,[31] even though it is certified,[32] is not sufficient; but if the tender is refused by the creditor on other grounds, he will be considered as having waived objection on the ground that it was by check.[33]

The debtor must also have the money with him; but its actual production may be waived by the creditor, not only expressly, but impliedly, as where, before it is produced, he declares that he will not receive it.[34] It need not necessarily be of the exact sum,[35] but it must be of such a sum that the creditor can take exactly what is due without being called upon to give change.[36] The tender must be made by the person whose duty

[29] Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158; Abshire v. Corey, 113 Ind. 484, 15 N. E. 685; People's Sav. Bank v. Borough of Norwalk, 56 Conn. 547, 16 Atl. 257; Tillou v. Britton, 9 N. J. Law, 120; Hubbard v. Bank, 8 Cow. (N. Y.) 88. *See "Tender," Dec. Dig. (Key-No.) §§ 11, 13; Cent. Dig. §§ 20, 29–32.*

[30] Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891. While the creditor may require legal tender money, a tender in other lawful money of the United States is sufficient, if not objected to on the ground of its not being legal tender. Edmunds Electric Const. Co. v. Mariotte, 162 Ind. 329, 69 N. E. 396. *See "Tender," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 29–32.*

[31] Te Poel v. Shutt, 57 Neb. 592, 78 N. W. 288. *See "Tender, Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 29–32.*

[32] Barbour v. Hickey, 2 App. D. C. 207, 24 L. R. A. 703. *See "Tender," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 29–32.*

[33] Beatty v. Miller, 47 Ind. App. 494, 94 N. E. 897; Neal v. Finley, 136 Ky. 346, 124 S. W. 348; Kollitz v. Equitable Mut. Fire Ins. Co., 92 Minn. 234, 99 N. W. 892; Gunby v. Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. And see Walsh v. Association, 101 Mo. 534, 14 S. W. 722; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118. *See "Tender," Dec. Dig. (Key-No.) § 15; Cent. Dig. §§ 39–46.*

[34] Hazard v. Loring, 10 Cush. (Mass.) 267; Hall v. Insurance Co., 57 Conn. 105, 17 Atl. 356; Parker v. Pettit, 43 N. J. Law, 512; Collier v. White, 67 Miss. 133, 6 South. 618; Mathis v. Thomas, 101 Ind. 119; Knight v. Abbott, 30 Vt. 577; Pinney v. Jorgenson, 27 Minn. 26, 6 N. W. 376; Larsen v. Breene, 12 Colo. 480, 21 Pac. 498; Guthman v. Keam, 8 Neb. 502, 1 N. W. 129; Behaly v. Hatch, Walk. (Miss.) 369, 12 Am. Rep. 570; Oakland Bank of Savings v. Applegarth, 67 Cal. 86, 7 Pac. 139, 476; Dungan v. Insurance Co., 46 Md. 469. *See "Tender," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 29–32.*

[35] Walsh v. Colvin, 53 Wash. 309, 101 Pac. 1085. *See "Tender," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 29–32.*

[36] Betterbee v. Davis, 3 Camp. 70; Robinson v. Cook, 6 Taunt. 336; Fridge v. State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; Weld v. Bank, 158 Mass. 339, 33 N. E. 519; Brandt v. Railroad Co., 26 Iowa, 114; Patnote v. Sanders,

it is to pay, or by his agent, and not by a mere stranger or intermeddler;[37] and it must be made to the party entitled to receive payment, or to his duly-authorized agent;[38] and it must be understood as a tender, and be absolute and unconditional.[39] It has also been held that the tender must be made at a reasonably fit

41 Vt. 66, 98 Am. Dec. 564; Patterson v. Cox, 25 Ind. 261; Perkins v. Beck, 4 Cranch C. C. 68, Fed. Cas. No. 10,984. A tender of 9 cents less than $584.32 due has been held insufficient. Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co., 106 Me. 345, 76 Atl. 879. But failure to include three days' interest on $40, amounting to 2 cents, has been held immaterial, on the theory that the law does not consider trifles. Matzger v. Page, 62 Wash. 170, 113 Pac. 254. *See "Tender," Dec. Dig. (Key-No.) § 13; Cent. Dig. §§ 29–32.*

[37] Sinclair v. Learned, 51 Mich. 335, 16 N. W. 672; Kincaid v. School Dist., 11 Me. 188; Brown v. Dysinger, 1 Rawle (Pa.) 408; Mahler v. Newbaur, 32 Cal. 168, 91 Am. Dec. 571; McDougald v. Dougherty, 11 Ga. 570; Johnson v. Smock, 1 N. J. Law, 106. *See "Tender," Dec. Dig. (Key-No.) § 6; Cent. Dig. § 8.*

[38] Carman v. Pultz, 21 N. Y. 547; Wilson v. Doran, 110 N. Y. 101, 17 N. E. 688; Oatman v. Walker, 33 Me. 67; King v. Finch, 60 Ind. 420; McIniffe v. Wheelock, 1 Gray (Mass.) 600; Conrad v. Trustees of Grand Grove, 64 Wis. 258, 25 N. W. 24; Billiot v. Robinson, 13 La. Ann. 529; Hoyt v. Byrnes, 11 Me. 475; Cropp v. Hambleton, Cro. Eliz. 48; Carmen v. Pultz, supra. Tender to one of several joint creditors sufficient. Oatman v. Walker, supra; Dawson v. Ewing, 16 Serg. & R. (Pa.) 371; Flanigan v. Seelye, 53 Minn. 23, 55 N. W. 115. *See "Tender," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 9, 10, 22.*

[39] Hunter v. Warner, 1 Wis. 141; Potts v. Plaisted, 30 Mich. 149; Tompkins v. Batie, 11 Neb. 147, 7 N. W. 747, 38 Am. Rep. 361; Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158; Pulsifer v. Shepard, 86 Ill. 513; Odum v. Railroad Co., 94 Ala. 488, 10 South. 222; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; Appeals of Forest Oil Co., 118 Pa. 138, 12 Atl. 442, 4 Am. St. Rep. 584; Rives v. Dudley, 56 N. C. 126, 67 Am. Dec. 231; Henderson v. Cass County, 107 Mo. 50, 18 S. W. 992; Cothran v. Scanlan, 34 Ga. 555; Rose v. Duncan, 49 Ind. 269. Where the amount is disputed, an offer of less than the creditor claims, on condition that it be accepted in discharge of the debt, is not a valid tender, though no more than offered be due. Thomas v. Evans, 10 East, 101; Wood v. Hitchcock, 20 Wend. (N. Y.) 47; Thayer v. Brackett, 12 Mass. 450; Richardson v. Laboratory, 9 Metc. (Mass.) 42; Chapin v. Chapin (Mass.) 36 N. E. 746; Elderkin v. Fellows, 60 Wis. 339, 19 N. W. 101; Draper v. Hitt, 43 Vt. 439, 5 Am. Rep. 292; MOORE v. NORMAN, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526, Throckmorton Cas. Contracts, 376; Doty v. Crawford, 39 S. C. 1, 17 S. E. 377; Latham v. Hartford, 27 Kan. 249; Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202. Tender under protest, reserving right to dispute amount due, is good, if it does not impose conditions on creditor. Greenwood v. Sutcliffe [1892] 1 Ch. 1. Tender of amount due on a mortgage is not rendered invalid by fact that it is accompanied by condition that the mortgage be satisfied, since the condition is one which the mortgagee, on being paid, is bound to perform. Halpin v. Insurance Co., 118 N. Y. 165, 23 N. E. 482. Contra, Loring v. Cooke, 3

time and place.[40] And if no place is fixed by law or by the terms of the contract, and the creditor is in the state, it is the duty of the debtor to seek the creditor and tender payment where he is.[41] The law, however, does not require a useless thing, and a formal tender is therefore unnecessary where the creditor by his declarations or conduct has clearly indicated that it will be refused.[42]

So, also, where goods are tendered in compliance with a contract of sale, the tender must comply with all the terms of the contract. An offer to deliver a greater or a less quantity than the contract calls for, is not a valid tender.[43] It is also necessary that the buyer shall be given an opportunity to examine them if he chooses, so that he may satisfy himself that they comply with the terms of the contract; otherwise, he does not break the contract by refusing to accept them.[44]

DISCHARGE OF CONTRACT BY BREACH—IN GENERAL

240. Breach of contract is where a party thereto breaks through the obligation which it imposes.

241. The effect of a breach of contract is that—

(a) It always gives the party injured a right of action.

(b) It often, but not always, discharges the contract. This depends upon circumstances to be presently discussed.

If one of the parties to a contract breaks through the obligation which it imposes, a new obligation arises in every case—a right

Pick. (Mass.) 48; Lindsay v. Matthews, 17 Fla. 575. See Jones, Mortg. § 900. Tender to pledgee of amount secured is not vitiated by condition that pledge be delivered. Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435. *See "Tender," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 33–38.*

[40] Waldron v. Murphy, 40 Mich. 668. *See "Tender," Dec. Dig. (Key-No.) §§ 8, 9; Cent. Dig. §§ 11–19.*

[41] Berley & Kyzer v. Columbia, N. & L. R. Co., 82 S. C. 232, 64 S. E. 397. *See "Tender," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 11, 12.*

[42] Weinberg v. Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956. *See "Tender," Dec. Dig. (Key-No.) §§ 4, 5; Cent. Dig. §§ 5–7.*

[43] Dixon v. Fletcher, 3 Mees. & W. 146; Hart v. Mills, 15 Mees. & W. 85; Curliffe v. Harrison, 6 Exch. 903; Perry v. Iron Co., 16 R. I. 318, 15 Atl. 87; Rommel v. Wingate, 103 Mass. 327; Croninger v. Crocker, 62 N. Y. 151; Tiffany, Sales, 187. *See "Sales," Dec. Dig. (Key-No.) § 153; Cent. Dig. §§ 358–366.*

[44] Isherwood v. Whitmore, 10 Mees. & W. 757; Wyman v. Winslow, 11 Me. 398, 26 Am. Dec. 542; Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17; Tiffany, Sales, 197. *See "Sales," Dec. Dig. (Key-No.) § 153; Cent. Dig. §§ 358–366.*

of action conferred upon the party injured by the breach. Besides this, there are circumstances under which the breach will discharge the injured party from such performance as may still be due from him. Every breach of contract confers the right of action upon the injured party, but every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part, and, if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it is of such importance, the injured party may choose not to regard it as a discharge, preferring to continue to carry out the contract, reserving to himself the right to sue for such damages as he may have sustained by the breach. It is often very difficult to determine whether or not a breach of one of the terms of a contract discharges the party injured.[45] These questions will be discussed in the following pages.

FORMS OF DISCHARGE BY BREACH

242. A contract may be broken in any one of three ways:

(a) A party may renounce his liabilities under it.

(b) He may by his own act make it impossible for him to fulfill his liabilities under it.

(c) He may totally or partially fail to perform what he has promised.

Of these three forms of breach, the first two may take place while the contract is still wholly executory; that is, before either party is entitled to demand a performance by the other of his promise. The last can only take place at or during the time for performance.[46]

SAME—RENUNCIATION OF CONTRACT

243. Renunciation of a contract by one of the parties before the time for performance discharges the other party if he so chooses, but not otherwise, and entitles him to sue at once for the breach.[47]

[45] Anson, Cont. (4th Ed.) 276. [46] Anson, Cont. (4th Ed.) 280.

[47] Anson, Cont. (4th Ed.) 280–283. And see "Repudiation of Contracts," by Samuel Williston, 14 Harv. Law Rev. 317, 421.

244. Renunciation of a contract by one of the parties in the course of performance discharges the other party from a continued performance of his promise, and entitles him to sue at once for the breach.[48]

Before Performance is Due

The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time for performance arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due. It is therefore settled, by the great weight of authority, that the renunciation of a contract by one of the parties before the time for performance has come does not discharge the other unless the latter chooses to regard it as a discharge.[49] If he chooses, he may so regard it, and at once sue for the breach.[50] The discharge is optional with him. In a leading case on this point the defendant had engaged the plaintiff to enter into his service, the employment to commence at a future day, but before that time arrived he wrote the plaintiff that he should not require his services. The plaintiff at once sued for the breach of contract, though the time for performance had not arrived, and the court held that he was entitled to do so. It was said by the court that, "where there is a contract to do an act on a future day, there is a relation constituted

[48] Anson, Cont. (4th Ed.) 284, 285.

[49] Frost v. Knight, L. R. 7 Exch. 111; Avery v. Bowden, 5 El. & Bl. 714; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Nilson v. Morse, 52 Wis. 240, 9 N. W. 1; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; Zuck v. McClure, 98 Pa. 541. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[50] Hochster v. De la Tour, 2 El. & Bl. 678; Frost v. Knight, L. R. 7 Exch. 111; Roper v. Johnson, L. R. 8 C. P. 167; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; O'NEILL v. SUPREME COUNCIL A. L. OF H., 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422, Throckmorton Cas. Contracts, 378; Fox v. Kitton, 19 Ill. 519; Crabtree v. Messersmith, 19 Iowa, 179; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Chapman v. J. W. Beltz & Sons Co., 48 W. Va. 1, 35 S. E. 1013; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302; Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 37 S. E. 854. So, also, in executory contracts of sale, if, before the time arrives, the purchaser repudiates the contract, the seller need not tender the goods, but may sue at once for the breach. Roper v. Johnson, supra; Eckenrode v. Chemical Co., 55 Md. 51; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546; James v. Adams, 16 W. Va. 245; McCormick v. Basal 46 Iowa, 235; Zuck v. McClure, 98 Pa. 541; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; Platt v. Brand, 26 Mich. 173. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

between the parties in the meantime by the contract, and * * * they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation." [51] And in another case the defendant had agreed to marry the plaintiff upon his father's death, but renounced the contract, and the plaintiff was allowed to sue for the breach during the father's lifetime. "The promisee," it was said, "has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests." [52]

The case just mentioned is authority for the statement that the operation of the rule is not affected by the fact that the performance is contingent, for in this case the father may have outlived the plaintiff or the defendant, in which case the time for performance never could arise.

There must, however, be a positive and unqualified renunciation; a mere expression of intention not to perform is insufficient.[53]

The rule laid down above is subject to limitations: [54]

(1) The renunciation must deal with so much of the performance to which the contract binds the promisor that an actual breach at the time of performance would operate as a discharge. This point was mentioned in a case in which a tenant claimed damages of his landlord for breach of contract by repudiation of a covenant to rebuild the premises at a period of the tenancy which had not yet arrived. "The contract," it was said, "was the whole lease.

[51] Hochster v. De la Tour, 2 El. & Bl. 678. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[52] Frost v. Knight, L. R. 7 Exch. 111. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[53] Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; Vittum v. Estey, 67 Vt. 158, 31 Atl. 144; Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[54] It seems that if the obligation is merely to pay money, renunciation before payment falls due cannot have the effect of an anticipatory breach. See Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Nichols v. Steel Co., 137 N. Y. 471, 33 N. E. 561, 566; Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006; Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16, affirmed 166 N. Y. 631, 60 N. E. 1107. And it has been held that repudiation by the defendant after full performance by the plaintiff confers no right of action as for an anticipatory breach, on the ground that the defendant might elect to perform. Pittman v. Pittman, 110 Ky. 306, 61 S. W. 461. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say—though it is not necessary in this case to decide the point—that an anticipatory breach would not entitle him to do so, and that it does not appear to me that he could elect to rescind part of the contract." [55]

(2) The promisee must treat the renunciation by the promisor as a discharge. If he does not so treat the renunciation, but continues to insist on the performance of the promise, the contract remains in existence for the benefit, and at the risk, of both parties.[56] If anything occur, for instance, to discharge it from other causes, the promisor may take advantage of such discharge. A vessel owner agreed with a person, by charter party, that his ship should go to Odessa, and there take on a cargo from such person's agent. The vessel reached Odessa, and her master demanded a cargo, but the agent refused to supply one. The master, instead of treating this refusal as a breach of contract, and sailing away, in which event the vessel owner could have sued at once for breach of contract, continued to demand a cargo, and before the running days were out—before, therefore, a breach by nonperformance had occurred—a war broke out, rendering performance of the contract legally impossible. Afterwards, the owner sued for breach of the charter party, but it was held that as there

[55] Johnstone v. Milling, 16 Q. B. Div. 460. And see Obermyer v. Nichols, 6 Bin. (Pa.) 159, 6 Am. Dec. 439. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[56] See cases cited supra, note 49. Where the other party had not elected to treat a repudiation as a breach, held that he was not excused for subsequent nonperformance. Smith v. Banking Co., 113 Ga. 975, 39 S. E. 410. Where one party renounces, the other is not bound to sue for a breach before the day fixed for performance arrives, and to have his damages assessed as of the date of the renunciation. Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; Roebling's Sons' Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518. Cf. Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783. But a plaintiff may not after repudiation by the defendant go on with performance, and thereby increase his damages by a useless performance. Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; Lord v. Thomas, 64 N. Y. 107; Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Heaver v. Lanahan, 74 Md. 493, 22 Atl. 263; Chicago Bldg. & Mfg. Co. v. Barry (Tenn. Ch. App.) 52 S. W. 451; Peck & Co. v. Corrugating Co., 96 Mo. App. 212, 70 S. W. 169; WIGENT v. MARRS, 130 Mich. 609, 90 N. W. 423, Throckmorton Cas. Contracts, 333. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

had been no actual failure of performance before the war broke out (for the running days had not then expired), and as the renunciation of the contract had not been accepted as a breach, the charterer was entitled to the discharge of the contract, which took place upon the declaration of war.[57]

Though the rule as stated above is almost universally recognized, the Massachusetts court has held that a renunciation before the time for performance has arrived does not amount to a breach, that, to render a person liable "for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when, and under conditions such that, he is or might be entitled to require performance." [58]

In the Course of Performance.

It may also happen that, in the course of performance of a contract, one of the parties may, by word or act, deliberately and avowedly refuse performance on his part. In such a case the other party is exonerated from a continued performance of his promise, and is at once entitled to bring action.[59] Illustrations of such a discharge are furnished by those cases in which a person contracts for the manufacture and supply of goods to be delivered in certain quantities at specified dates, and, after delivery of a part, the buyer notifies the seller not to deliver any more. In such a case, in an action by the sellers, in which they averred readiness and willingness to deliver the rest of the goods, and that they had been prevented from doing so by the buyer, it was contended by the buyer that they should show, not merely readi-

[57] Avery v. Bowden, 5 El. & Bl. 714. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[58] Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384. And see Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757. Cf. Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[59] Cort v. Railway Co., 17 Q. B. 127; Textor v. Hutchings, 62 Md. 150; Hosmer v. Wilson, 7 Mich. 293, 74 Am. Dec. 716; Derby v. Johnson, 21 Vt. 17; James v. Adams, 16 W. Va. 245; Clement & Hawkes Mfg. Co. v. Meserole, 107 Mass. 362; Parker v. Russell, 133 Mass. 74; Haines v. Tucker, 50 N. H. 311; McCormick v. Basal, 46 Iowa, 235; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Amsden v. Atwood, 68 Vt. 322, 35 Atl. 311; North v. Mallory, 94 Md. 305, 51 Atl. 89; Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379. And see WIGENT v. MARRS, 130 Mich. 609, 90 N. W. 423, Throckmorton Cas. Contracts, 383. If a renunciation is treated as a discharge, it may not be withdrawn, even though the time for actual performance has not arrived. Quarton v. American Law Book Co., 143 Iowa, 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

ness and willingness to deliver, but actual delivery. The court, however, held the contrary, and stated the principle thus: "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and * * * he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them." [60]

In this case, however, as in that of a renunciation before performance due, the refusal of further performance must be positive and unequivocal in order to entitle the other party to treat the contract as discharged,[61] and a declaration of intention to abandon the contract at a future time is not sufficient, where the party is at the time engaged in performance of the contract.[62]

SAME—IMPOSSIBILITY CREATED BY PARTY

245. If a party to a contract, either before the time for performance or in the course of performance, makes performance, or further performance, by him impossible, the other party is discharged, and may sue at once for breach of contract.

If before the time for performance has arrived one of the parties, by his own act, makes it impossible to perform, the other is discharged, and may sue at once for a breach, as in case of renunciation.[63] Where a lessee, for instance, had promised to assign to

[60] Cort v. Railway Co., 17 Q. B. 127. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[61] Kilgore v. Baptist Educational Ass'n, 90 Tex. 144, 37 S. W. 601; Hardeman-King Lumber Co. v. Hampton Bros. (Tex. Civ. App.) 130 S. W. 647; WIGENT v. MARRS, 130 Mich. 609, 90 N. W. 423, Throckmorton Cas. Contracts, 383. *See "Contracts," Dec. Dig. (Key-No.) § 313; Cent. Dig. § 1279.*

[62] See cases cited supra, note 61.

[63] Lovelock v. Franklyn, 8 Q. B. 371; Ford v. Tiley, 6 Barn. & C. 325; Bowdell v. Parsons, 10 East, 359; Crabtree v. Messersmith, 19 Iowa, 179; Wolf v. Marsh, 54 Cal. 228; Lovering v. Lovering, 13 N. H. 513; Newcomb v. Brackett, 16 Mass. 161; Delamater v. Miller, 1 Cow. (N. Y.) 75, 13

another, at any time within seven years from the date of the promise, all his interest in the lease, but before expiration of the seven years assigned his whole interest to another person, it was held that he could be sued at once for breach of contract. "The plaintiff," it was said in that case, "has a right to say to the defendant: 'You have placed yourself in a situation in which you cannot perform what you have promised. You promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but, if I now were to tender you the money, you would not be ready.' That is a breach of the contract."[64] The rule applies where a person promises to execute a lease for a certain term, or a conveyance, and, before the time for executing arrives, executes a conveyance, or a lease covering that term, to another;[65] or where a person promises to sell specific goods on a certain day, and, before that day, sells them to another;[66] or where a person promises to marry, and, before the time for performance arrives, marries another than the promisee.[67]

The rule is the same where a party to a contract, by his voluntary act, in the course of performance, makes performance by him impossible.[68] An illustration is afforded in a case in which

Am. Dec. 512; Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862; Cooley v. Moss, 123 Ga. 707, 51 S. E. 625; Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 Pac. 494. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

[64] Lovelock v. Franklyn, 8 Q. B. 371. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

[65] Ford v. Tiley, 6 Barn. & C. 325; Synge v. Synge (1894) 1 Q. B. 466; Newcomb v. Brackett, 16 Mass. 161; Bassett v. Bassett, 55 Me. 127. Contra, Webb v. Stephenson, 11 Wash. 342, 39 Pac. 952; Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

[66] Bowdell v. Parsons, 10 East, 359; Hawley v. Keeler, 53 N. Y. 114; Smith v. Jordan, 13 Minn. 264 (Gil. 246), 97 Am. Dec. 232; Crist v. Armour, 34 Barb. (N. Y.) 378; Easton v. Jones, 193 Pa. 147, 44 Atl. 264. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

[67] Short v. Stone, 8 Q. B. 358; King v. Kersey, 2 Ind. 402; Sheahan v. Barry, 27 Mich. 217; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

[68] O'Neill v. Armstrong, [1895] 2 Q. B. 70; Woolner v. Hill, 93 N. Y. 576; Lovell v. Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Chicago v. Tilley, 103 U. S. 146, 26 L. Ed. 371; Hinckley v. Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Western Union Telegraph Co. v. Semmes, 78 Md. 9, 20 Atl. 127. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

the plaintiff had been engaged by the defendants, for a certain sum, to write a treatise for a serial published by them. The plaintiff incurred expense in preparing his work, and actually completed a part of it, but before it was delivered to the defendants they abandoned the publication of the serial. The plaintiff sued them on the special contract, and also on the quantum meruit for the work and labor expended by him on the treatise. It was argued that he could not recover upon the quantum meruit because, his part of the original contract being unperformed, the contract was not wholly at an end; but the court held that the abandonment of the publication put an end to the contract, and constituted a discharge.[60]

BREACH BY FAILURE OF PERFORMANCE

246. Whether or not failure of one party to perform the contract in whole or in part operates as a discharge of the other, or merely gives him a right of action for the breach, depends upon the nature of the respective promises, or, in other words, on the question whether they are—

(a) Independent of each other, in which case, as a rule, there is no discharge.

(b) Conditional upon each other, in which case, as a rule, there is a discharge.

In the cases of discharge by breach with which we have thus far dealt, the party at fault so deals with the contract, by word or act, as to intimate to the other party that performance, or further performance, as the case may be, on his part, is needless. In such cases, as we have seen, the courts hold that the party not in default is not bound to tender performance, but may consider the contractual tie broken, and sue at once for the other's breach. These cases are very clear and simple; but where the breach by one party does not make the contract wholly incapable of performance, and is not accompanied by any overt expression of

[60] Planché v. Colburn, 8 Bing. 14. So, also, where a person had been employed by a corporation for a number of years, and the company was voluntarily wound up before the time had expired, so that further performance by it was rendered impossible, the employé was permitted to sue at once for the breach of contract. Ex parte Maclure, L. R. 5 Ch. App. 737. And see Seipel v. Trust Co., 84 Pa. 47; UNITED STATES v. BEHAN, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, Throckmorton Cas. Contracts, 409; Newhall Engineering Co. v. Daly, 116 Wis. 256, 93 N. W. 12. *See "Contracts," Dec. Dig. (Key-No.) § 314; Cent. Dig. § 1446.*

intention to abandon his rights, it is not always easy to determine whether the other party is thereby discharged, or whether he merely acquires a right of action for the breach. It is necessary in these cases to look to the terms of the contract, and ascertain the intention of the parties as to the nature of their respective promises. The difficulties resolve themselves into the question whether the promises of the parties are independent of, or conditional upon, one another.[70] This question must be discussed at some length; but it may be well to state at the outset that, as a general rule, failure of a party to perform his promise does not discharge the other from liability to perform his, if the promises are independent of each other; but that it is, as a rule, otherwise, if the promises are conditional upon one another.

SAME—INDEPENDENT PROMISES

247. Failure of one of the parties to a contract to perform an independent promise does not discharge the other party from liability to perform, but merely gives him a right of action for the breach.

248. A promise may be independent in the following ways:

(a) It may be absolute—that is, wholly unconditional upon performance by the other party; but promises, each of which forms the whole consideration for the other, will not be held independent of one another, unless the intention of the parties to make them independent is clear.

(b) It may be divisible—that is, the promise may be susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of the failure.

(c) It may be subsidiary—that is, the promise broken may be a term of the contract which the parties have not regarded as vital to its existence.

Absolute Promises

If a person makes a promise to another in consideration of a promise by the latter to him, and has not in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon performance by the other party, he is not discharged by the latter's breach of his promise.[71] He has giv-

[70] Anson, Cont. (4th Ed.) 286.

[71] Thorpe v. Thorpe, 12 Mod. 455; Thomas v. Cadwallader, Willes, 496; Ware v. Chappell, Style, 186; Dey v. Dox, 9 Wend. (N. Y.) 129, 24 Am.

en his promise in consideration of the promise of the other party, and not in consideration of performance by the latter of his promise. In other words, he has accepted the latter's liability in return for his own promise.

When it has once been determined that mutual promises are absolute and independent of each other, there can be little difficulty in applying the law; but it is often very difficult to decide as to the character of a promise in this respect, and this difficulty has resulted in much conflict between the cases. The old cases turned upon a very technical construction of terms,[72] but the modern cases show that the tendency of the courts is not to construe promises to be absolute and independent of one another, where they form the whole consideration for one another, unless there is some very definite expression of an intention of the parties to that effect.[73] "Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done."[74] The order in which the things are to be done is a very sure test for determining whether promises are absolute or not.[75] "When it appears that one of two

Dec. 137; Long v. Caffrey, 93 Pa. 526; Hard v. Seeley, 47 Barb. (N. Y.) 428; Barnett v. Franklin College, 10 Ind. App. 103, 37 N. E. 427; Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; and cases hereafter cited. *See "Contracts," Dec. Dig. (Key-No.) § 318; Cent. Dig. §§ 1508–1527.*

[72] Rolle, Abr. p. 518; Ware v. Chappell, Style, 186, and see Glazebrook v. Woodrow, 8 Term R. 366. In 15 Hen. VII. p. 10, pl. 17, for instance, it was held that if A. covenant with B. to serve him for a year, and B. covenant with A. to give him a certain sum of money, and does not say "for the cause aforesaid," A. shall have an action for the money, though he never serves B., but that it is otherwise if B. says that A. shall have the money "for the cause aforesaid." See 2 Pars. Cont. note *r*, in which the old and modern cases are collected, and the law reviewed at length. *See "Contracts," Dec. Dig. (Key-No.) § 318; Cent. Dig. §§ 1513–1528.*

[73] Anson, Cont. (4th Ed.) 289; MORTON v. LAMB, 7 Term R. 125, Throckmorton Cas. Contracts, 396; Graves v. Legg, 9 Exch. 709; Dakin v. Williams, 11 Wend. (N. Y.) 67; Dey v. Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; Bank v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Quigley v. De Haas, 82 Pa. 267; Lutz v. Thompson, 87 N. C. 334; Hamilton v. Thrall, 7 Neb. 210; Davis v. Jeffris, 5 S. D. 352, 58 N. W. 815; post, p. 578. *See "Contracts," Dec. Dig. (Key-No.) §§ 278, 318; Cent. Dig. §§ 1207–1213, 1508–1527.*

[74] MORTON v. LAMB, 7 Term R. 125, Throckmorton Cas. Contracts, 396; Stavers v. Curling, 3 Bing. N. C. 355; Proprietors of Mill-Dam Foundry v. Hovey, 21 Pick. (Mass.) 417; Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. Ed. 157; City of New Orleans v. Texas & P. Ry. Co., 171 U. S. 312, 18 Sup. Ct. 875, 883, 43 L. Ed. 178. *See "Contracts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 1508–1527.*

[75] Mattock v. Kinglake, 10 Adol. & E. 50; Couch v. Ingersoll, 2 Pick.

covenants or promises is to be performed at an earlier date than the other, * * * the rule is simple and uniform, namely, that the covenant or promise that is to be performed first is independent and absolute, while the one that is to be performed last is dependent, the performance of the former being a condition precedent to the performance of the latter." [76] Where a person makes a promise to another to convey land, for instance, the date of performance not being fixed, and the other party, in consideration thereof, promises to pay a sum of money at a fixed date, it has been held that the payment is independent of the promise, and that, "a time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase money, without averring performance of the consideration." [77] Where, on

(Mass.) 292; Robson v. Bohn, 27 Minn. 333, 7 N. W. 357; State v. Railroad Co., 21 Minn. 472; McCoy's Adm'rs v. Bixbee's Adm'r, 6 Ohio, 310, 27 Am. Dec. 258; Slater v. Emerson, 19 How. 224, 15 L. Ed. 626; Front St. M. & O. R. Co. v. Butler, 50 Cal. 574; Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. Ed. 563; Standard Gaslight Co. v. Wood, 61 Fed. 74, 9 C. C. A. 362; Loud v. Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; Reindl v. Heath, 115 Wis. 219, 91 N. W. 734. "Where the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent without express words." Proprietors of Mill-Dam Foundry v. Hovey, 21 Pick (Mass.) 417. *See "Contracts," Dec. Dig. (Key-No.) § 321; Cent. Dig. §§ 1508–1527.*

[76] Langd. Sum. Cont. § 122; Dey v. Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137. And see Kinney v. Federal Laundry Co., 75 N. J. Law, 497, 68 Atl. 111. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1213.*

[77] Mattock v. Kinglake, 10 Adol. & E. 50. And see Goldsborough v. Orr, 8 Wheat. 217, 5 L. Ed. 600; Bean v. Atwater, 4 Conn. 3, 10 Am. Dec. 91; Edgar v. Boies, 11 Serg. & R. (Pa.) 445; Lowry v. Mehaffy, 10 Watts (Pa.) 387; Kane v. Hood, 13 Pick. (Mass.) 281; Headley v. Shaw, 39 Ill. 354; Tronson v. University, 9 N. D. 559, 84 N. W. 474. "Where a contract for the sale of land provides for partial payments of the purchase money prior to delivery of the deed, the vendor may sue for such installments when due without tendering a conveyance. Paine v. Brown, 37 N. Y. 228; Harrington v. Higgins, 17 Wend. (N. Y.) 376. But when, after the installments are all due, the vendor brings an action for the purchase money, he is not entitled to recover without proving an offer before suit to convey. * * * When the last installment falls due, the payment of the whole of the unpaid purchase money and the conveyance of the land become dependent acts. Beecher v. Conradt, 13 N. Y. 108, 64 Am. Dec. 535. And the same rule applies when an action is brought for any installment payable at or after the term fixed for the delivery by the deed. Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362, 363. See, also, Grant v. Johnson, 5 N. Y. 247; McCroskey v. Ladd, 96 Cal. 455, 31 Pac. 558; First Nat. Bank v. Spear,

the other hand, mutual promises are to be performed at the same time, as where a person promises to convey land or deliver goods to another on a certain day, and the latter, in consideration thereof, promises to pay a sum of money on that day, neither can maintain an action on the other's promise without performing, or offering to perform, his part; and it makes no difference that it does not appear which promise was to be first performed.[78]

Neither this nor any other test, however, can be relied upon in all cases, for often it does not appear when or in what order promises are to be performed. The question in each case is what intent is disclosed by the language employed.[79]

Promises the Performance of Which is Divisible

Contracts frequently occur in which the promise of one or both parties admits of a more or less complete performance, and the damage sustained by an incomplete performance or partial breach of which may be apportioned according to the extent of failure. The performance of the promise in such cases is said to be divisible. The promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one or some of them does not discharge the other party.[80] On the other hand, the promise may be indivisible or entire, and if it so, and is not independent of the promise of the other party as heretofore explained, its

12 S. D. 108, 80 N. W. 166; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210. Contra, Sheeren v. Moses, 84 Ill. 448. See Harriman, Cont. §§ 321, 322. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1213.*

[78] See the cases above cited; Williams v. Healey, 3 Denio (N. Y.) 363; Gazley v. Price, 16 Johns. (N. Y.) 267; post, p. 575. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1213.*

[79] Loud v. Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. Ed. 157; Foley v. Dwyer, 122 Mich. 587, 81 N. W. 569; Griggs v. Moors, 168 Mass. 354, 47 N. E. 128; Quinlan v. Green County, Ky., 157 Fed. 33, 84 C. C. A. 537, 19 L. R. A. (N. S.) 849. *See "Contracts," Dec. Dig. (Key-No.) §§ 278, 281; Cent. Dig. §§ 1207–1213, 1281–1283.*

[80] Ritchie v. Atkinson, 10 East, 295; Norris v. Harris, 15 Cal. 226; McGrath v. Cannon, 55 Minn. 457, 57 N. W. 150; Potsdamer v. Kruse, 57 Minn. 193, 58 N. W. 983; Fullmer v. Poust, 155 Pa. 275, 26 Atl. 543, 35 Am. St. Rep. 881; Gill v. Lumber Co., 151 Pa. 534, 25 Atl. 120; Ming v. Corbin, 142 N. Y. 334, 37 N. E. 105. Even where there is an entire contract for the sale of goods, although if the seller delivers a quantity less than he contracted to sell the buyer may reject them, it is generally held that if the buyer accepts them he must pay for them at the contract price, although the seller fails to deliver the rest. Oxendale v. Wetherell, 4 Man. & R. 429; Bowker v. Hoyt, 18 Pick. (Mass.) 555; Booth v. Tyson, 15 Vt. 515; Clark v. Moore, 3 Mich. 55; Richards v. Shaw, 67 Ill. 222; Polhemus v. Heiman, 45 Cal. 573; McDonough v. Marble Co., 112 Fed. 634, 50 C. C. A. 403. Contra, Champlin v. Rowley, 18 Wend. (N. Y.) 187; Id., 13 Wend. (N. Y.)

entire performance is, as a rule, a condition concurrent or precedent to the liability of the other party to perform.[81]

The question of divisibility is difficult, and this difficulty has resulted in a direct conflict in the decisions. The question is one of construction. "The contract may be entire or severable, according to the circumstances of each particular case," it has been said in speaking of contracts of sale, "and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. * * * 'On the whole, the weight of opinion and the more reasonable rule would seem to be that, where there is a purchase of different articles, at different prices, at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties.' This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts, and by the circumstances of each particular case."[82] Though this was said in reference to contracts of sale, the reason applies to other contracts as well.[83]

In a leading case the plaintiff had promised to take his ship to a port, and there load a complete cargo, and to deliver the same on being paid freight. He came away with an incomplete cargo, and the defendant refused to pay any freight on the ground that the completeness of the cargo was a condition precedent to any payment being due. Lord Ellenborough said that whether it was so

258; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Nightingale v. Eiseman, 121 N. Y. 288, 24 N. E. 475; Haslack v. Mayers, 26 N. J. Law, 284; Witherow v. Witherow, 16 Ohio, 238. Even in New York the seller can recover, if the acceptance of part is made under such circumstances as to be a waiver of full performance, as where he is informed by the seller that he will not deliver the rest. Avery v. Wilson, 81 N. Y. 341, 37 Am. Rep. 503; Silberman v. Fretz, 16 Misc. Rep. 449, 38 N. Y. Supp. 151. *See "Contracts," Dec. Dig. (Key-No.) § 319; Cent. Dig. §§ 1476–1507.*

[81] Hartupee v. Crawford (C. C.) 56 Fed. 61; Widman v. Gay, 104 Wis. 277, 80 N. W. 450; Prautsch v. Rasmussen, 133 Wis. 181, 113 N. W. 416; Quarton v. American Law Book Co., 143 Iowa, 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1 (contract for sale of set of books and delivery by installments). *See "Contracts," Dec. Dig. (Key-No.) § 297; Cent. Dig. §§ 1214, 1215.*

[82] Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736. *See "Contracts," Dec. Dig. (Key-No.) § 171; Cent. Dig. §§ 754–757; "Sales," Dec. Dig. (Key-No.) § 62; Cent. Dig. §§ 171–179.*

[83] Broumel v. Rayner, 68 Md. 47, 11 Atl. 833. *See "Sales," Dec. Dig. (Key-No.) § 62; Cent. Dig. §§ 171–179.*

or not depended, "not on any formal arrangement of words, but on the reason and sense of the thing, as it is to be collected from the whole contract; * * * here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery." [84]

Same—Delivery by Installments

Where there is a contract for the sale of goods deliverable in installments, which are to be paid for on delivery, and the seller makes defective delivery in respect to one installment, or the buyer fails to take delivery or to pay for an installment, the question arises whether the breach gives rise merely to a claim for compensation, or to a right to treat the whole contract as repudiated. It is difficult to reconcile the English decisions, some of which have held that a refusal to deliver or accept a particular installment is a breach going to the root of the contract,[85] and others have held the contrary.[86] The leading case in the affirmative is Hoare v. Rennie.[87] In that case the defendant agreed to buy from the plaintiff 667 tons of iron, to be shipped from Sweden in about equal portions in each of the months of June, July, August, and September, and the plaintiff shipped only 20 tons in June, which the defendant refused to accept. It was held that delivery at the time specified was a condition precedent, and that the plaintiff could not maintain an action against the defendant for not accepting. The leading case in the negative is Simpson v. Crippin.[88] In that case the defendant had agreed to supply the plaintiff with 6,000 or 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery in equal monthly quantities during the period of 12 months from July 1st. During July the plaintiff sent wagons for 158 tons only, and on August 1st the defendant wrote that the contract was canceled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. It was held, in an action on the defendant's refusal to go on with the contract,

[84] Ritchie v. Atkinson, 10 East, 295. *See "Contracts," Dec. Dig. (Key-No.) § 171; Cent. Dig. §§ 754–757.*

[85] Hoare v. Rennie, 5 Hurl. & N. 19; Honck v. Muller, 7 Q. B. Div. 92. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[86] Jonassohn v. Young, 4 Best & S. 296; Simpson v. Crippin, L. R. 8 Q. B. 14; Freeth v. Burr, L. R. 9 C. P. 208. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[87] 5 Hurl. & N. 19. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[88] L. R. 8 Q. B. 14. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

that the breach in failing to send wagons in sufficient numbers in the first month, though a ground for compensation, did not justify the defendant in rescinding the contract. Finally, in Mersey Steel & Iron Co. v. Naylor,[89] it was decided that failure of the buyer to pay for the first installment upon delivery, unless the circumstances evince an intention on his part to be bound no longer by the contract, does not entitle the seller to rescind. The rule in England appears to be established by this decision that it is a question depending on the terms of the contract and the circumstances in the case whether the breach of contract is a repudiation of the whole contract, giving a right to put an end to it, or whether it merely gives rise to a claim for compensation.

In this country the same conflict has existed, some cases following Hoare v. Rennie[90] and some Simpson v. Crippin.[91] In the Supreme Court of the United States in NORRINGTON v. WRIGHT,[92] the rule laid down in the first of these cases was approved. In NORRINGTON v. WRIGHT the contract was for the sale of "5,000 tons of iron rails, for shipment from European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August, 1880, at $45 per ton, ex ship Philadelphia, settlement cash on presentation of bills," etc. It was held that the seller was bound to

[89] 9 App. Cas. 434, affirming 9 Q. B. Div. 648. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[90] NORRINGTON v. WRIGHT, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, Throckmorton Cas. Contracts, 386; Cleveland Rolling-Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; Clark v. Steel Works, 3 C. C. A. 600, 53 Fed. 494; Peace River Phosphate Co. v. Grafflin (C. C.) 58 Fed. 550; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Rugg v. Moore, 110 Pa. 236, 1 Atl. 820; Reybold v. Voorhees, 30 Pa. 116; Robson v. Bohn, 27 Minn. 333, 7 N. W. 357; Providence Coal Co. v. Coxe, 19 R. I. 380, 582, 35 Atl. 210; Cresswell Ranch & Cattle Co. v. Martindale, 63 Fed. 84, 11 C. C. A. 33. See, also, Dwinel v. Howard, 30 Me. 258; Walton v. Black, 5 Houst. (Del.) 149; Bradley v. King, 44 Ill. 339; Stokes v. Baars, 18 Fla. 656; Higgins v. Railroad Co., 60 N. Y. 553. *See "Sales," Dec. Dig. (Key-No.) §§ 62, 163; Cent. Dig. §§ 171–179, 386–388.*

[91] Bollman v. Burt, 61 Md. 415; Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159; Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692; Hansen v. Steam Heating Co., 73 Iowa, 77, 34 N. W. 495; Gerli v. Manufacturing Co., 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611; Mayor v. Schaub Bros., 96 Md. 534, 54 Atl. 106. And see West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[92] 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, Throckmorton Cas. Contracts, 386. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

ship 1,000 tons in each month, and that only 400 tons having been shipped in February, and 885 tons in March, the buyer, although he had paid for the February shipment in ignorance of the defective shipments in that month and in March, had the right to rescind the whole contract for the defective deliveries in respect to the first installment. The decision rests on the ground that in contracts of merchants time is of the essence, and that the shipment at the time specified in the contract was a condition precedent, on failure of which the buyer might rescind the whole contract. It is to be noted that Gray, J., in commenting on Mersey Steel & Iron Co. v. Naylor, distinguishes that case, pointing out that the grounds of the decision, as stated by the lord chancellor, are applicable only to the case of failure by the buyer to pay for, and not to failure of the seller to deliver, the first installment; that is, that since delivery must precede payment no particular payment can be a condition precedent to the entire contract, and hence the payment cannot be a condition precedent to the subsequent fulfillment of the unfulfilled part, by delivery of subsequent installments.[93]

By the Sales Act adopted in England in 1903,[94] and since by a number of states in this country,[95] the rule prescribed as to the breach of a contract for delivery by installments is that "it depends in each case upon the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

Same—Repudiation of Contract

The courts are agreed that if a default in one item of a continuous contract of this nature is accompanied with an announcement of intention not to perform the contract upon the agreed terms, the

[93] Mere failure to pay, not evincing a purpose to renounce, held not to justify the seller in treating the contract as abandoned. Monarch Cycle Mfg. Co. v. Wheel Co., 105 Fed. 324, 44 C. C. A. 523; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. But see Robson v. Bohn, 27 Minn. 333, 7 N. W. 357; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320; Hull Coal & Coke Co. v. Coke Co., 51 C. C. A. 213, 113 Fed. 256. Cf. Beatty v. Lumber Co., 77 Minn. 272, 79 N. W. 1013. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[94] St. 55 & 57 Vict. c. 71, § 31.

[95] Acts Mass. 1908, c. 237, § 45 (2).

In 1912, the Uniform Sales Act had been adopted in the following states: Arizona, Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, and Wisconsin. 37 Am. Bar Ass'n Rep. 1124 (1912).

other party may treat the contract as being at an end.[96] It has been held, for example, that upon a contract for the sale of implement handles of different patterns, a rejection of one installment by the buyer, accompanied by a refusal to accept any further deliveries of handles of one of the patterns included in the contract, discharges the seller from further deliveries under the contract.[97] And a failure to pay for one installment, accompanied by circumstances indicating the intention of the buyer to abandon the entire contract, entitles the seller to treat the contract as discharged.[98]

Same—Express Provision for Discharge

It is always permissible for the parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condition precedent to the right to a fulfillment by the other party of his promise.[99] This point is illustrated by a case in which the master of a ship gave a sailor a note promising to pay him 30 guineas, which was more than the ordinary wages, "provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." The sailor died after having performed the agreement for about seven weeks, but about three weeks before the ship reached Liverpool. The court held that the sailor's representatives could not recover upon the express contract, for its terms were unfilled; nor could they recover upon a quantum meruit for such services as he had rendered, because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a quantum meruit. "It may fairly be considered," it was said, "that the parties themselves understood that, if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage." [1]

[96] Withers v. Reynolds, 2 Barn. & Adol. 882; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Stephenson v. Cady, 117 Mass. 6; ante, pp. 558, 561. And see Bloomer v. Bernstein, L. R. 9 C. P. 588. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[97] Laswell v. National Handle Co., 147 Mo. App. 497, 126 S. W. 969. *See "Sales," Dec. Dig. (Key-No.) § 163; Cent. Dig. §§ 386–388.*

[98] Quarton v. American Law Book Co., 143 Iowa, 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1. *See "Contracts," Dec. Dig. (Key-No.) § 171; Cent. Dig. §§ 754–757; "Sales," Dec. Dig. (Key-No.) § 99; Cent. Dig. § 264.*

[99] Cutter v. Powell, 6 Term R. 320; 2 Smith, Lead. Cas. 1, and notes; Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382; Martin v. Shoenberger, 8 Watts & S. (Pa.) 367; Hartley v. Decker, 89 Pa. 470. *See "Contracts," Dec. Dig. (Key-No.) § 171; Cent. Dig. §§ 754–757.*

[1] Cutter v. Powell, 6 Term R. 320. *See "Contracts," Dec. Dig. (Key-No.) § 171; Cent. Dig. §§ 754–757.*

Subsidiary Promises

The breach committed by one of the parties may be a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. The injured party is then bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default of the other.[2] In a leading case, the plaintiff, a professional singer, had entered into a contract with the defendant, director of an opera, for his services as a singer for a considerable time, and upon a number of terms, one of which was that the plaintiff should be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals. The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this breach as a discharge of the contract. The court held that, in the absence of any express declaration that the term was vital to the contract, it must "look to the whole contract, and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different, in substance, from what the defendant has stipulated for, or whether it merely partially affects it, and may be compensated for in damages;" and the court held that the term did not go to the root of the matter, so as to constitute a condition precedent.[3]

Where a promise is to be performed in the course of the performance of the contract, and after some of the consideration, of which it forms a part, has been given, it will be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract.[4]

[2] Tarrabochia v. Hickie, 1 Hurl. & N. 183; Weintz v. Hafner, 78 Ill. 27; Boone v. Eyre, 1 H. Bl. 273, note. It is under this principle that a party is not discharged by failure of the other to perform within the time stipulated, where the time is not of the essence. Ante, pp. 512, 572. *See "Contracts," Dec. Dig. (Key-No.) § 297; Cent. Dig. §§ 1214, 1215.*

[3] Bettini v. Gye, 1 Q. B. Div. 183. *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032.*

[4] Anson, Cont. (4th Ed.) 294, citing Graves v. Legg, 9 Exch. 716, per Parke, B. See, also, Campbell v. Jones, 6 Term R. 570. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1213.*

CONDITIONAL PROMISES

249. Where a promise is subject to a condition, that condition must, as regards its relation to the promise in time, be either—

(a) Subsequent,

(b) Concurrent, or

(c) Precedent.

250. In the case of a condition subsequent, the rights of the promisee are determinable upon a specified event. The condition does not affect their commencement, but its occurrence brings them to a conclusion.

251. In the case of a condition concurrent, the promisee's rights are dependent upon his doing, or being ready to do, something simultaneously with the performance by the promisor.

252. In the case of a condition precedent, the promisee's rights do not arise until something has been done or has happened, or some period of time has elapsed.

253. Where the promise in a contract is conditional, the promisor may be discharged—

(a) By the promisee's failure to perform a concurrent condition.

(b) By the fact that there has been a total or substantial failure on the promisee's part to do that which he was bound to do under the contract—a state of things sometimes described as virtual failure of consideration.

(c) By the untruth of some one statement, or the breach of some one term, which the parties considered to be vital to the contract.

Conditions Subsequent

We have already dealt with conditions subsequent in treating of discharge of contract by agreement, and it is unnecessary to speak further of them here.[5]

Breach of Concurrent Condition

Concurrent conditions seem, in point of fact, to be conditions precedent, for the simultaneous performance of his promise by each party must needs be impossible except in contemplation of law. What is meant by the phrase is that there must be a concurrent readiness and willingness to perform, and that, if one is not able or willing to do his part, the other is discharged.[6] This form of con-

[5] Ante, p. 526.

[6] Gail v. Gail, 127 App. Div. 892, 112 N. Y. Supp. 96. *See "Contracts," Dec. Dig. (Key-No.) §§ 173, 278; Cent. Dig. §§ 762–764, 1207–1213.*

dition is more particularly applicable to contracts of sale, where payment and delivery are assumed, in the absence of express stipulation, to be intended to be contemporaneous.[7] Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, the seller cannot demand payment of the price unless he is ready at the same time to deliver the goods, and the buyer cannot demand possession of the goods unless he is ready to pay the price.[8] In an action for breach of a contract by which the plaintiff had agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant had promised to deliver the corn within one month, the plaintiff merely alleged that he had always been ready and willing to receive the corn. The court held that as the plaintiff did not allege that he had been ready to pay the price, there was nothing, as he had shaped his case, to show that he had not himself broken the contract and discharged the defendant by nonreadiness to pay.[9]

Conditions Precedent—Suspensory Conditions [10]

We are here dealing with the subject of discharge of contract, and are therefore concerned with those conditions precedent the nonfulfillment of which is a cause of discharge. To make the subject clear, however, we must mention and explain a class of conditions precedent which do not operate as a discharge, but merely suspend the operation of a promise until they are fulfilled. These are called by Anson floating or suspensory conditions. A promise, for instance, may be conditional upon the happening of an uncertain event, as in the case of a contract of fire or marine insurance, where the insurer's liability on his promise does not accrue until the loss of the property insured. The condition suspends the operation of the promise.

[7] Anson, Cont. (4th Ed.) 298.

[8] MORTON v. LAMB, 7 Term R. 125, Throckmorton Cas. Contracts, 396; Bloxam v. Sanders, 4 Barn. & C. 941; Stephenson v. Cady, 117 Mass. 6; Hapgood v. Shaw, 105 Mass. 276; Porter v. Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; Cook v. Ferral's Adm'rs, 13 Wend. (N. Y.) 285; Phelps v. Hubbard, 51 Vt. 489; Hough v. Rawson, 17 Ill. 588; Posey v. Scales, 55 Ind. 282; Simmons v. Green, 35 Ohio St. 104; Campbell v. Moran Bros. Co., 97 Fed. 477, 38 C. C. A. 293; Allen v. Hartfield, 76 Ill. 358; Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53. So, also, in case of a sale of real estate. Smith v. Lewis, 26 Conn. 110; Swan v. Drury, 22 Pick. (Mass.) 485; Clark v. Weiss, 87 Ill. 438, 29 Am. Rep. 60; Gazley v. Price, 16 Johns. (N. Y.) 267; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219; ante, p. 568. *See "Sales," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 229–233.*

[9] MORTON v. LAMB, 7 Term R. 125, Throckmorton Cas. Contracts, 396. *See "Sales," Dec. Dig. (Key-No.) § 411; Cent. Dig. §§ 1161–1164.*

[10] Anson, Cont. (4th Ed.) 296, 297.

Again, a promise may depend upon the act of one of the parties or of some third person.[11] For instance, it may be made a condition precedent to one party's liability under the contract that he shall be satisfied with the other party's performance; and in such a case, by the weight of authority, he cannot be compelled to perform his part, unless he is satisfied.[12] Other examples are in the case of promises to pay for the construction of a building or other construction work, conditional upon the approval and certificate of the architect or other third person. In such cases payment cannot be enforced without such approval unless there is fraud, or such gross mistake as to necessarily imply bad faith.[13]

Again, a promise may be conditional in the sense that its operation is postponed until the lapse of a certain time, as in case of a debt for which a fixed period of credit is given, or until the happening of an event that is certain to happen, as in the case of a contract of life insurance.

Or, again, a promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no time is specified in which the act is to be done, the nonfulfillment of the condition merely suspends, and does not discharge, the rights of the promisee. Illustrations of such conditions are furnished by cases of promises conditional upon demand or no-

[11] Cavanaugh v. Iowa Beer Co., 136 Iowa, 236, 113 N. W. 856. *See "Contracts," Dec. Dig. (Key-No.) §§ 225, 282; Cent. Dig. §§ 1284–1289.*

[12] Ante, p. 541.

[13] Morgan v. Birnie, 9 Bing. 672; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; Kennedy v. Poor, 151 Pa. 472, 25 Atl. 119; Lewis v. Railroad Co. (C. C.) 49 Fed. 708; Bradner v. Roffsell, 57 N. J. Law, 412, 31 Atl. 387; Gilmore v. Courtney, 158 Ill. 432, 41 N. E. 1023; Ashley v. Henehan, 56 Ohio St. 559, 47 N. E. 573; King v. City of Duluth, 78 Minn. 155, 80 N. W. 874; John Pritzlaff Hardware Co. v. Berghoefer, 103 Wis. 359, 79 N. W. 564. Where the recovery of sick benefits depended on certificate of a physician, his refusal to make it did not excuse failure to produce it. Audette v. L'Union St. Joseph, 178 Mass. 113, 59 N. E. 668. Where there is fraud or bad faith, the action of the third person is not conclusive. Baltimore & O. R. Co. v. Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; Whelen v. Boyd, 114 Pa. 228, 6 Atl. 384; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263. In New York it is held that failure to obtain the certificate will not defeat a recovery if it is refused unreasonably. Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; MacKnight Flintic Stone Co. v. City of New York, 160 N. Y. 72, 54 N. E. 661. See, also, Bird v. St. Johns Episcopal Church, 154 Ind. 138, 56 N. E. 129. Cf. Audette v. L'Union St. Joseph, supra. *See "Contracts," Dec. Dig. (Key-No.) § 284; Cent. Dig. §§ 1292–1342.*

tice. If a person promises another to do something upon demand, he cannot be sued until demand has been made;[14] or if he promises to do something upon the happening of an event, and stipulates that notice shall be given him of the event having happened, he cannot be sued until such notice has been given. Even if there is no such stipulation for notice, yet, if the happening of the event is peculiarly within the knowledge of the promisee, an implied condition will be imported into the contract that notice must be given before a suit can be maintained.[15]

Same—Vital Conditions

In the cases last considered, neither the nonfulfillment of the condition nor an action brought before fulfillment will discharge the promisor. The condition merely suspends the right to performance of the promise.[16]

The conditions with which we are now concerned effect a discharge of contract by their breach.

Where the promise of one party is conditional upon the promise of the other, the performance of the latter promise is either a condition precedent or a condition concurrent, as the case may be, and in either case the nonperformance of the condition not only gives ground for an action for breach of the contract, but discharges the contract. Where the promise of each party is the whole consideration for the promise of the other, and there is nothing to indicate that either was to perform first, or that the promises are independent, the case is one of concurrent conditions.[17]

It may appear, however, either expressly, or impliedly from the nature of the contract, that one promise is to be performed before the other. In such a case, as we have seen, the promise which is to be first performed is independent, and the promisee may enforce it, or sue for its breach, without having performed, or offered to perform, on his part. The promise of the latter, on the other hand, is

[14] Allen v. Allen, 116 Iowa, 697, 88 N. W. 1091. *See "Contracts," Dec. Dig. (Key-No.) § 277; Cent. Dig. §§ 1217–1232.*

[15] Makin v. Watkinson, L. R. 6 Exch. 25. *See "Contracts," Dec. Dig. (Key-No.) § 277; Cent. Dig. §§ 1217–1232.*

[16] Palmer v. Temple, 9 Adol. & E. 508. *See "Contracts," Dec. Dig. (Key-No.) §§ 225, 278; Cent. Dig. §§ 1207–1213.*

[17] MORTON v. LAMB, 7 Term R. 125, Throckmorton Cas. Contracts, 396; Graves v. Legg, 9 Exch. 709; Dakin v. Williams, 11 Wend. (N. Y.) 67; Dey v. Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; People v. Glann, 70 Ill. 232; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Quigley v. De Haas, 82 Pa. 267; Lutz v. Thompson, 87 N. C. 334; Clark v. Collier, 100 Cal. 256, 34 Pac. 677; Leslie v. Casey, 59 N. J. Law, 6, 35 Atl. 6; Gray v. Smith (C. C.) 76 Fed. 525; ante, p. 575. *See "Contracts," Dec. Dig. (Key-No.) §§ 225, 278; Cent. Dig. §§ 1207–1213.*

conditional; that is, performance by the other is a condition precedent to any liability to perform it.[18] If a person promises to work for another, or to build or repair a house for him, and the latter agrees to pay him certain compensation therefor, the promise to work or to build the house is impliedly, from the nature of the contract, to be first performed, and is independent. The promise to pay, on the other hand, is conditional. The servant[19] or contractor[20] cannot recover unless he shows a performance on his part, or unless he was prevented from fully performing by the other party, or by such an impossibility as excuses him. If a time is fixed for his performance, and it is of the essence of the contract, a failure to perform within that time will discharge the other party.[21]

[18] Gail v. Gail, 127 App. Div. 892, 112 N. Y. Supp. 96. And see ante, p. 568. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1213.*

[19] If the servant without legal excuse abandons the employment before full performance, he can recover nothing for his services, neither upon the contract, because under an entire contract full performance is a condition precedent to the right of recovery thereon, nor upon an implied contract, because the special contract controls the rights of the parties in respect to what has been done under it, and excludes any implied contract. Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Olmstead v. Beale, 19 Pick. (Mass.) 528; Miller v. Goddard, 34 Me. 104, 56 Am. Dec. 638; Lawrence v. Miller, 86 N. Y. 131; Goldstein v. White (Com. Pl.) 16 N. Y. Supp. 860; Hansell v. Erickson, 28 Ill. 257; Thrift v. Payne, 71 Ill. 403; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Diefenback v. Stark, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719. But see Hilderbrand v. American Fine Arts Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826, holding that a servant discharged for cause may recover for services rendered subject to the employer's right to recoup damages by reason of facts justifying discharge. In some states, however, a recovery upon a quantum meruit, to the extent of benefits received, is permitted, the recovery, if any, being estimated at the contract price, with deduction for what it would cost to procure a completion and of any damages sustained by reason of the breach. Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; McClay v. Hedge, 18 Iowa, 66; Duncan v. Baker, 21 Kan. 99; Parcell v. McComber, 11 Neb. 209, 11 N. W. 529, 38 Am. Rep. 366; West v. Van Pelt, 34 Neb. 63, 51 N. W. 313. *See "Master and Servant," Dec. Dig. (Key-No.) §§ 52–58; Cent. Dig. §§ 66–69.*

[20] Homer v. Shaw, 177 Mass. 1, 58 N. E. 160. As to substantial performance, ante p. 539. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1213.*

[21] Carter v. Phillips, 144 Mass. 100, 10 N. E. 500; Goldsmith v. Guild, 10 Allen (Mass.) 239; Taylor v. Longworth, 14 Pet. 172, 10 L. Ed. 405; Hicks v. Aylsworth, 13 R. I. 562; Wilson v. Roots, 119 Ill. 379, 10 N. E. 204; Chrisman v. Miller, 21 Ill. 227; Wynkoop v. Cowing, 21 Ill. 570; Grigg v. Landis, 21 N. J. Eq. 494; Adams v. Guyandotte Valley Ry. Co., 64 W. Va. 181, 61 S. E. 341. In the case of a contract for sale of goods, failure to deliver at the time specified discharges the buyer, and he is not bound to accept a subsequent tender. Welsh v. Gossler, 89 N. Y. 540; Jones v. U. S., 96 U. S. 24, 24 L. Ed. 644; ante, p. 512. *See "Contracts," Dec. Dig. (Key-No.) § 299; Cent. Dig. §§ 1372–1381.*

Same—Executory Contract of Sale

In every executory contract of sale, where the goods are sold by description, there is an implied condition, often miscalled an implied warranty,[22] that the goods shall conform to the description. In such cases the tender of goods answering the description is a condition precedent to the buyer's liability, and if the condition is not performed he is entitled to reject the goods.[23] Moreover, in a sale of goods by description, where the buyer has not an opportunity to examine the goods, there is also an implied condition that the goods shall be salable or merchantable,[24] and under some circumstances a condition that goods ordered for a particular purpose are reasonably fit for that purpose is implied.[25] These implied conditions are frequently spoken of as warranties, but inasmuch as they go to the essence of the contract the latter term is misleading. The courts in different jurisdictions differ as to whether such a condition survives acceptance.[26] But all cases agree that where the property has not passed, the buyer is discharged by a failure of such an implied condition; and that he may reject the goods, and may also bring an action for such damages as he has sustained.[27]

[22] "Two things are often confounded. * * * If a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty." Per Lord Abinger in Chanter v. Hopkins, 4 Mees. & W. 399. See, also, Bowes v. Shand, 2 App. Cas. 455, 480; POPE v. ALLIS, 115 U. S. 371, 6 Sup. Ct. 69, 29 L. Ed. 393, Throckmorton Cas. Contracts, 398. *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[23] Josling v. Kingsford, 32 L. J. C. P. 904; Allan v. Lake, 18 Q. B. 560; POPE v. ALLIS, 115 U. S. 363, 371, 6 Sup. Ct. 69, 29 L. Ed. 393, Throckmorton Cas. Contracts, 398; Bagley v. Rolling-Mill Co. (C. C.) 21 Fed. 159, 162. See, also, NORRINGTON v. WRIGHT, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366, Throckmorton Cas. Contracts, 386, per Gray, J.; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; Jones v. George, 61 Tex. 345, 349, 48 Am. Rep. 280; Avery v. Miller, 118 Mass. 500; Haase v. Nonnemacher, 21 Minn. 486, 490; Dailey v. Green, 15 Pa. 118; Woodle v. Whitney, 23 Wis. 55, 99 Am. Dec. 102; Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438; Morse v. Moore, 83 Me. 473, 479, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. Although the sale is by sample, it is not enough that the bulk corresponds with the sample if it does not correspond with the description. Michals v. Godts, 10 Exch. 191. *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[24] Jones v. Just, L. R. 3 Q. B. 197; Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; English v. Commission Co., 57 Fed. 451, 6 C. C. A. 416. *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[25] Jones v. Just, L. R. 3 Q. B. 197; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163. *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[26] Post, p. 584.

[27] POPE v. ALLIS, 115 U. S. 363, 371, 6 Sup. Ct. 69, 29 L. Ed. 393, Throck-

For the same reason, the buyer may reject the goods if they fail to conform to the quality which the seller warranted they should possess;[28] for an undertaking that goods shall possess a certain quality, whether in the form of a description or a warranty, is "a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of these qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."[29]

Same—Executed Contract of Sale

Where the buyer has accepted the goods, it is held in England and in many jurisdictions in this country that he cannot afterwards reject them.[30] By accepting he waives his right to reject them, and must seek his remedy by action on the warranty or by setting up the breach in diminution of the price. And this applies whether the sale is of specific goods unconditionally—that is, goods ascertained and agreed upon at the time of the contract—or whether the sale is of unascertained goods, which are subsequently accepted. In some states, however, where there is an express warranty, it is held that the buyer may rescind the contract for breach of the warranty, notwithstanding acceptance, and may return the goods.[31]

morton Cas. Contracts, 398; Anson, Cont. (8th Ed.) 302. *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[28] Street v. Blay, 2 Barn. & Adol. 456; Syers v. Jonas, 2 Exch. 111, 117; Heilbutt v. Hickson, L. R. 7 C. P. 438, 451; Dailey v. Green, 15 Pa. 126; Doane v. Dunham, 65 Ill. 512; Id., 79 Ill. 131; Cox v. Long, 69 N. C. 7, 9; Lewis v. Rountree, 78 N. C. 323; Byers v. Chapin, 28 Ohio St. 300; Bigger v. Bovard, 20 Kan. 204; Polhemus v. Heiman, 45 Cal. 573. *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[29] 2 Smith, Lead. Cas. (8th Am. Ed.) 31; POPE v. ALLIS, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393, Throckmorton Cas. Contracts, 398; Benj. Sales, § 895; El Paso & S. W. R. Co. v. Eichel & Weikel (Tex. Civ. App.) 130 S. W. 922 (delivery of machine of less capacity than that contracted for). *See "Sales," Dec. Dig. (Key-No.) § 166; Cent. Dig. §§ 391–402.*

[30] Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Denton, 1 Cromp. & M. 207; Poulton v. Lattimore, 9 Barn. & C. 259; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595; Matteson v. Holt, 45 Vt. 336; Freyman v. Knecht, 78 Pa. 141; Muller v. Eno, 14 N. Y. 597; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 269, 23 N. E. 372, 16 Am. St. Rep. 753; Hoover v. Sidener, 98 Ind. 290; Merrick v. Wiltse, 37 Minn. 41, 33 N. W. 3; Wright v. Davenport, 44 Tex. 164; ISAACS v. WANAMAKER, 71 Misc. Rep. 55, 127 N. Y. Supp. 846, Throckmorton Cas. Contracts, 402. *See "Sales," Dec. Dig. (Key-No.) § 179; Cent. Dig. §§ 456–468.*

[31] BRYANT v. ISBURGH, 13 Gray (Mass.) 607, 74 Am. Dec. 655, Throckmorton Cas. Contracts, 401; Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; Marshall v. Perry, 67 Me. 78; Franklin v. Long, 7 Gill

Same—Conditions Precedent in Narrower Sense

In the cases with which we have just been dealing, one of the parties to a contract has been excused from performance of his promise by reason of the entire failure of the other party to perform his promise. We now come to what Sir William Anson calls conditions precedent in the narrower and more frequent use of the term as meaning a single term in the contract, but a term possessing a particular character. In this sense a condition precedent is a statement or promise, the untruth or nonperformance of which discharges the contract.[32]

The chief difficulty with regard to conditions precedent consists in determining whether or not the parties to a contract regarded a particular term as essential. If they did, the term is a condition, and its failure discharges the contract;[33] if they did not, the term is a warranty, and its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term.[34] Conditions are to be distinguished from warranties, although both terms are often loosely, and even interchange-

& J. (Md.) 407; Sparling v. Marks, 86 Ill. 125; Branson v. Turner, 77 Mo. 489; Upton Mfg. Co. v. Huiske, 69 Iowa, 557, 29 N. W. 621; Boothby v. Scales, 27 Wis. 626. This rule has been embodied in the Uniform Sales Act (Acts Mass. 1908, c. 237) § 69, (1), (d). And see ante, p. 574. *See "Sales," Dec. Dig. (Key-No.) § 288; Cent. Dig. §§ 817–823.*

[32] Anson, Cont. (4th Ed.) 303. See Behn v. Burness, 3 Best & S. 751; Glanholm v. Hays, 2 Man. & G. 257; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768; Cleveland Rolling-Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; People v. Glann, 70 Ill. 232; Tobias v. Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509; Newhall v. Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741; Husted v. Craig, 36 N. Y. 221; Ogden v. Kirby, 79 Ill. 555; Harder v. Commissioners, 97 Ind. 455; Bell v. Hoffman, 92 N. C. 273; Salmon v. Boykin, 66 Md. 541, 7 Atl. 701. "A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which the term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." NORRINGTON v. WRIGHT, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366, Throckmorton Cas. Contracts, 386. *See "Contracts," Dec. Dig. (Key-No.) §§ 221, 278; Cent. Dig. §§ 1015–1032, 1207–1213.*

[33] Daly v. City of Carthage, 143 Mo. App. 564, 128 S. W. 265, in which it is said, per Cox, J.: "If a breach cannot be compensated for in damages, then the covenants are dependent, and must of necessity be so, else there could be no remedy at all." *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032.*

[34] Cavanagh v. Iowa Beer Co., 136 Iowa, 236, 113 N. W. 856. *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032.*

ably, used. In its proper sense, a warranty is "an express or implied statement of something which the party undertakes shall be a part of a contract; and though part of the contract, yet collateral to the express object of it." [85] If the statement of a party in a contract that a certain thing is true is a condition, the other party is discharged if it is false; but if the statement is a warranty, only, the other party is not discharged, but merely has a right of action for breach of the warranty. A warranty is a mere promise to indemnify.[86]

The question whether a particular term in a contract is a condition precedent or a warranty depends upon the construction of each particular contract. The question is to be determined by the intention of the parties, and by the application of common sense to each particular case; and, when the intention is once discovered, it will control technical forms of expression.[87] As said in a leading case: "Parties may think some matter, apparently of very little importance, essential, and, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and, if they sufficiently express such an intention, it will not be a condition precedent." [88] In other words, the question in each case, where it is to be determined whether a breach of a particular term operates as a discharge, is whether or not the breach goes to the essence of the contract.[89]

[85] Chanter v. Hopkins, 4 Mees. & W. 399, 1 H. & H. 377, 8 L. J. (N. S.) Ex. 14, 3 Jur. 58, 51 Rev. Rep. 630, per Lord Abinger, C. B. See, also, Dorr v. Fisher, 1 Cush. (Mass.) 271. *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032.*

[86] Ante, p. 261.

[87] Stavers v. Curling, 3 Bing. N. C. 355. *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032; "Sales," Dec. Dig. (Key-No.) § 250; Cent. Dig. § 709.*

[88] Bettini v. Gye, 1 Q. B. Div. 183. And see Graves v. Legg, 9 Exch. 709; Behn v. Burness, 3 Best. & S. 756; Watchman v. Crook, 5 Gill & J. (Md.) 239; Maryland Fertilizing & Mfg. Co. v. Lorentz, 44 Md. 218; Grant v. Johnson, 5 N. Y. 247; Knight v. Worsted Co., 2 Cush. (Mass.) 271, 287; Mill-Dam Foundry v. Hovey, 21 Pick. (Mass.) 417, per Shaw, C. J.; ante, p. 566. *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032.*

[89] Freeman v. Taylor, 8 Bing. 124; Franklin v. Miller, 4 Adol. & E. 599; Tarrabochia v. Hickie, 1 Hurl. & N. 183; McAndrew v. Chapple, L. R. 1 C. P. 706; Bradford v. Williams, L. R. 7 Exch. 259; Jackson v. Insurance Co., L. R. 10 C. P. 125; Poussard v. Spiers, 1 Q. B. Div. 410; Rioux v. Brick Co., 72 Vt. 148, 47 Atl. 406; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. As to waiver of full performance. District of Columbia v.

A condition precedent may assume the form either of a statement or of a promise.

Waiver and Acquiescence in Breach of Condition

A condition precedent may, in the course of the performance of the contract, change its character, and in effect cease to be a condition. Acquiescence in its breach may in effect turn it into a mere warranty. In other words, a breach of condition, which would discharge a party if at once treated by him as a discharge, will not have this effect if he goes on with the contract instead of repudiating it, and takes a benefit under it; but in such a case he can only recover his damages.[40] "Although conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily received and accepted the benefit of the part performance, knowing that the contract was not being fully performed, the latter may be thereby precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect to the defective performance." [41]

An illustration of such a change in the effect of a condition is afforded by a leading English case, in which it appeared that the defendant had chartered the plaintiff's vessel for a certain voyage, and promised to pay a certain sum in full for her use on condition of her taking a cargo of not less than 1,000 tons. The defendant had the use of the vessel as agreed upon, but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for nonpayment of the freight, the defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted, in its inception, to a condition, and it was said that the defendant, while the contract was still executory, might have rescinded, and refused to put any goods on board, but as the

Iron Works, 181 U. S. 453, 21 Sup. Ct. 680, 45 L. Ed. 948. *See "Contracts," Dec. Dig. (Key-No.) § 221; Cent. Dig. §§ 1015–1032.*

[40] Behn v. Burness, 3 Best & S. 756; Graves v. Legg, 9 Exch. 709; Pust v. Dowie, Law J. 32 Q. B. 179; Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Wiley v. Inhabitants of Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; Sykes v. City of St. Cloud, 60 Minn. 442, 62 N. W. 613; Young Bros. Mach. Co. v. Young, 111 Mich. 118, 69 N. W. 152; Charley v. Potthoff, 118 Wis. 258, 95 N. W. 124; Carter v. Scargill, L. R. 10 Q. B. 564; Bechtel v. Cone, 52 Md. 698; Foley v. Crow, 37 Md. 51. *See "Contracts," Dec. Dig. (Key-No.) § 316; Cent. Dig. §§ 1480–1492.*

[41] Wiley v. Inhabitants of Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342, per Field, J. *See "Contracts," Dec. Dig. (Key-No.) § 316; Cent. Dig. §§ 1480–1492.*

contract had been executed, and the defendant had received a substantial part of the consideration, he could not rescind the contract, but must be left to his cross action for damages.[42]

A further illustration is found in the case of an executed sale. We have already seen that in an executory sale an undertaking that goods shall possess a certain quality is in effect a condition, and that where goods are sold by description it is an implied condition that they shall conform to the description, and that under some circumstances other conditions, such as that the goods shall be merchantable, will be implied.[43] In such cases, where the goods tendered do not fulfill the conditions, it is very generally held that the buyer may nevertheless accept them, and in effect treat the breach of condition as a breach of warranty.[44] Some cases, however, draw a distinction between conditions and warranties, and hold that, while an express warranty survives acceptance, a condition that the goods shall be of a certain description does not survive, so far as concerns visible defects, when the buyer had an opportunity to inspect, but that if, after opportunity for inspection, the buyer accepts the goods, he is precluded from recovering damages for any variation between the goods as delivered and as described.[45]

It seems that the performance must be of a substantial part of the contract,[46] and that the acceptance must be under such cir-

[42] Pust v. Dowie, Law J. 32 Q. B. 179. *See "Contracts," Dec. Dig. (Key-No.) § 316; Cent. Dig. §§ 1480–1491.*

[43] Ante, p. 580.

[44] Bagley v. Rolling-Mill Co. (C. C.) 21 Fed. 159; English v. Commission Co. (C. C.) 48 Fed. 197; Id., 6 C. C. A. 416, 57 Fed. 451; Reynolds v. Palmer (C. C.) 21 Fed. 433; Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438; Holloway v. Jacoby, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737; Lewis v. Rountree, 78 N. C. 323; Eagan Co. v. Johnson, 82 Ala. 233, 2 South. 302; Dayton v. Hooglund, 89 Ohio St. 671; Morse v. Moore, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; Tacoma Coal Co. v. Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890. See, also, Marsh v. McPherson, 105 U. S. 709, 26 L. Ed. 1139. *See "Sales," Dec. Dig. (Key-No.) §§ 176, 179; Cent. Dig. §§ 436–444, 456–468.*

[45] Haase v. Nonnemacher, 21 Minn. 486; Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; Thompson v. Libby, 35 Minn. 443, 29 N. W. 150 (implied condition of merchantableness does not survive acceptance in respect to visible defects); Comstock v. Sanger, 51 Mich. 497, 16 N. W. 872; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777. This rule prevails in New York, Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; except as to a warranty that goods shall conform to sample. Zabriskie v. Railroad Co., 181 N. Y. 72, 29 N. E. 1006. *See "Sales," Dec. Dig. (Key-No.) § 176; Cent. Dig. §§ 436–444.*

[46] Anson, Cont. (4th Ed.) 308, citing Ellen v. Topp, 6 Exch. 424. *See "Contracts," Dec. Dig. (Key-No.) § 316; Cent. Dig. §§ 1480–1491; "Sales," Dec. Dig. (Key-No.) §§ 176, 179; Cent. Dig. §§ 436–444, 456–468.*

cumstances as to show that the party accepting knew, or ought to have known, that the contract was not being fully performed.[47]

Breach Caused by the Other Party

Though performance by one party of a part or the whole of his promise may be a condition precedent to the liability of the other party to perform, still his failure to perform will not discharge the latter, if the latter prevented performance. In such a case the party so prevented is discharged from further performance, and may recover damages for the breach or recover on the quantum meruit for his part performance.[48]

Failure of Consideration

"Strictly speaking, there can be no such thing as a failure of consideration. Either the promisor receives the consideration he bargained for, or he does not. If he does not receive the consideration, there is no contract; if he does receive the consideration, there can be no failure of consideration thereafter." [49] The term is, however, frequently used to express the situation which arises where the promisee fails wholly or partly to perform a promise which was the consideration of the promise of the promisor. Some cases usually considered under the head of failure of consideration may be mentioned here.

As we have seen, where there is a contract for the sale of goods by description it is an implied condition of the contract that the goods shall correspond to the description. By accepting the goods tendered, indeed, the buyer is ordinarily held to have waived his right to rely on the condition, and the condition, in effect, becomes a warranty.[50] Where, however, a thing is sold as being an article of a specific description, and from latent defect, unknown to the buyer, it is in substance not an article of that description, but an article of no value, the buyer may rescind the sale notwithstanding acceptance, and may defend an action for the price or may recover

[47] Wiley v. Inhabitants of Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342, per Field, J. *See "Contracts," Dec. Dig. (Key-No.) § 278; Cent. Dig. §§ 1207–1215.*

[48] Ante, p. 558; UNITED STATES v. BEHAN, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, Throckmorton Cas. Contracts, 409; Hinckley v. Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Hood v. Exploration Co. (C. C.) 106 Fed. 408; Mooney v. Iron Co., 82 Mich. 263, 46 N. W. 376; Caldwell v. Myers, 2 S. D. 506, 51 N. W. 210; Thompson v. Gaffey, 52 Neb. 317, 72 N. W. 314; Wellston Coal Co. v. Paper Co., 57 Ohio St. 182, 48 N. E. 888; Southern Pac. Co. v. Well Works, 172 Ill. 9, 49 N. E. 575; San Francisco Bridge Co. v. Improvement Co., 119 Cal. 272, 51 Pac. 335. *See "Contracts," Dec. Dig. (Key-No.) §§ 300, 303; Cent. Dig. §§ 1374, 1424–1429.*

[49] Harriman, Cont. § 524. See 9 Cyc. Law & Proc. 369.

[50] Ante, p. 585.

the price if he has paid it. In such cases it is commonly said that there has been a total failure of consideration. Such a state of facts occurs where the thing sold is a bill or note or other security, and it turns out to be invalid because of forgery [51] or for other causes; [52] the instrument thus being not what it purports to be, but a mere worthless piece of paper. So in the sale of a patent, if the patent is void.[53] But though the thing sold thus proves to be worthless, if the buyer assumed the risk of its validity, and consequently obtained the identical thing which he intended to buy, there is no failure of consideration.[54]

Where on the sale of personal property the buyer accepts the goods, he may still bring an action for damages if the goods are inferior in quality to that warranted; or, instead of bringing an action for damages, he may wait till he is sued for the price, and then set up the breach of warranty in diminution of the price pro tanto as a defense.[55] And to-day in most states such damages may be

[51] Jones v. Ryde, 5 Taunt. 488; Gurney v. Womersley, 4 El. & Bl. 133; Terry v. Bissell, 26 Conn. 23; Aldrich v. Jackson, 5 R. I. 218; Merriam v. Wolcott, 8 Allen (Mass.) 258, 80 Am. Dec. 69. See, also, Whitney v. Bank, 45 N. Y. 303; Bell v. Dagg, 60 N. Y. 528. *See "Bills and Notes," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 166–212.*

[52] Burchfield v. Moore, 2 El. & Bl. 683 (material alteration); Gompertz v. Bartlett, 2 El. & Bl. 849, 23 Law J. Q. B. 65 (a bill of exchange purporting to be a foreign bill, which turned out to be a domestic bill, and invalid because unstamped); Wood v. Sheldon, 42 N. J. Law, 421, 36 Am. Rep. 523 (scrip illegally and fraudulently issued); Paul v. City of Kenosha, 22 Wis. 266, 94 Am. Dec. 598; Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199 (bond stricken with nullity by constitutional provision adopted after act authorizing issue). *See "Bills and Notes," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 166–212; "Contracts," Cent. Dig. §§ 398–400.*

[53] Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Harlow v. Putnam, 124 Mass. 553; Shepherd v. Jenkins, 73 Mo. 510; Green v. Stuart, 7 Baxt. (Tenn.) 418; Herzog v. Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646. Cf. Chemical Electric Light & Power Co. v. Howard, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168; Gloucester Isinglass & Glue Co. v. Cement Co., 154 Mass. 92, 27 N. E. 1005, 2 L. R. A. 563, 26 Am. St. Rep. 214. *See "Bills and Notes," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 166–212.*

[54] Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Blattenberger v. Holman, 103 Pa. 555; Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Hunting v. Downer, 151 Mass. 275, 23 N. E. 832. On this principle, it has been held that where bonds are sold which are invalid because the corporation has not power to issue them, or failed to comply with the law in their issuance, the purchaser is liable on his promise to pay. Otis v. Cullum, 92 U. S. 447, 23 L. Ed. 496; Harvey v. Dale, 96 Cal. 160, 31 Pac. 14; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98. But see Hurd v. Hall, 12 Wis. 112. *See "Bills and Notes," Dec. Dig. (Key-No.) § 97; Cent. Dig. §§ 166–212.*

[55] Mondel v. Steel, 8 Mees. & W. 858; Lyon v. Bertram, 20 How. 149, 154, 15 L. Ed. 847; Bradley v. Rea, 14 Allen (Mass.) 20; Dailey v. Green, 15 Pa.

set up by way of defense in an action on a note given for the price.[56] In such cases, where the article sold by reason of failure to conform to the warranty is wholly worthless, so that the breach of warranty is a complete defense, it is often said that there is an entire failure of consideration;[57] and if the damages recoverable for the breach of warranty would simply reduce the amount of the recovery, it is often said that there has been a partial failure of consideration.[58]

Again, upon a sale of personal property, the seller impliedly warrants his title to the goods sold, unless the circumstances are such as to show that the seller is transferring only such property as he had in the goods.[59] Where the circumstances are such that a warranty of title is to be implied, if it turns out that the seller was not in fact the owner, it is said that the consideration fails, and in such case the buyer can defend an action for the price, or recover it if he has paid it.[60]

Where the subject-matter of the sale is land, and it turns out that the vendor had no title, the purchaser may interpose the failure of title as a defense in an action for the price or upon notes given therefor.[61] In the case of the sale of land with covenants by

118, 126; Dayton v. Hooglund, 89 Ohio St. 671; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Morehouse v. Comstock, 42 Wis. 626; Polhemus v. Heiman, 45 Cal. 573; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Central Trust Co. v. Manufacturing Co., 77 Md. 202, 26 Atl. 493. *See "Sales," Dec. Dig. (Key-No.) §§ 425, 428; Cent. Dig. §§ 1207, 1208, 1214–1223.*

[56] Withers v. Greene, 9 How. 213, 13 L. Ed. 109; Ruff v. Jarrett, 94 Ill. 475; Wentworth v. Dows, 117 Mass. 14, per Colt, J.; Wright v. Davenport, 44 Tex. 164; Bayview Brewing Co. v. Techlenberg, 19 Wash. 469, 53 Pac. 724. *See "Sales," Dec. Dig. (Key-No.) § 21; Cent. Dig. §§ 33–38.*

[57] Thompson v. Manufacturing Co., 29 Kan. 476; Toledo Sav. Bank v. Rathmann, 78 Iowa, 288, 43 N. W. 193; Aultman & Taylor Co. v. Trainer, 80 Iowa, 451, 45 N. W. 757; Brown v. Weldon, 99 Mo. 564, 13 S. W. 342. *See "Sales," Dec. Dig. (Key-No.) § 21; Cent. Dig. §§ 33–38.*

[58] Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Nichols & Shepard Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630; Russ Lumber & Mill Co. v. Water Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186. *See "Sales," Dec. Dig. (Key-No.) § 21; Cent. Dig. §§ 33–38.*

[59] Benj. Sales (6th Am. Ed.) § 639; Tiffany, Sales, 165.

[60] Eichholz v. Bannister, 17 C. B. (N. S.) 708; Chenault v. Bush, 84 Ky. 528, 2 S. W. 160; Flandrow v. Hammond, 148 N. Y. 129, 42 N. E. 511. And see Gould v. Bourgeois, 51 N. J. Law, 361, 18 Atl. 64. *See "Sales," Dec. Dig. (Key-No.) § 263; Cent. Dig. §§ 746–751, 763.*

[61] Murphy v. Jones, 7 Ind. 529; Anderson v. Armstead, 69 Ill. 452; Ferguson v. Teel, 82 Va. 690; Curtis v. Clark, 133 Mass. 509; Baird v. Laevison, 91 Ky. 204, 15 S. W. 252; Redding v. Lamb, 81 Mich. 318, 45 N. W. 997; Hall v. McArthur, 82 Ga. 572, 9 S. E. 534. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 15; Cent. Dig. § 16.*

the vendor, questions have arisen as to whether the failure of the title amounts to a total failure of consideration. In a Massachusetts case a note had been given in consideration of a conveyance of land by deed, with the usual covenants of seisin and warranty, and the title to the land failed entirely. The question raised was whether that want of title was an entire want of consideration for the note, so as to render it nudum pactum, or whether the covenants in the deed were of themselves a sufficient consideration. It was held, contrary to a decision in Maine,[62] that the total failure of title was a total failure of consideration, and that the note was therefore void. "The promise is not made for a promise," it was said, "but for the land. The moving cause is the estate, and, if that fails to pass, the promise is a mere nudum pactum." [63]

Same—Subsequent Failure of Executed Consideration

If the promisor receives a consideration for his promise, the fact that it subsequently diminishes in value, or becomes worthless, does not release him from liability on his promise.[64] The transfer and delivery of a note, for instance, by the payee to the maker of another note, in exchange therefor, is a valuable consideration for the latter note, and the fact that the former note subsequently becomes worthless does not constitute a failure of consideration.[65] So, if a patent is sold, the fact that it afterwards becomes value-

[62] Jenness v. Parker, 24 Me. 289; Lloyd v. Jewell, 1 Greenl. (Me.) 360, 10 Am. Dec. 78. And see Black v. Walker, 98 Ga. 81, 26 S. E. 477; Bennett v. Pierce, 45 W. Va. 654, 31 S. E. 972. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) § 308; Cent. Dig. §§ 862, 877–899.*

[63] Rice v. Goddard, 14 Pick. (Mass.) 293. And see Frisbee v. Hoffnagle, 11 Johns. (N. Y.) 50; McAllister v. Reab, 4 Wend. (N. Y.) 483; Durment v. Tuttle, 50 Minn. 426, 52 N. W. 909; Steinhauer v. Witman, 1 Serg. & R. (Pa.) 447; Gray v. Handkinson's Heirs, 1 Bay (S. C.) 278; Bell's Adm'r v. Huggins' Adm'rs, 1 Bay (S. C.) 827; Trask v. Vinson, 20 Pick. (Mass.) 110; Chandler v. Marsh, 8 Vt. 162; Cook v. Mix, 11 Conn. 432; Tillotson v. Grapes, 4 N. H. 448; Tyler v. Young, 2 Scam. (Ill.) 447, 35 Am. Dec. 116; Davis v. McVickers, 11 Ill. 327. But see Sunderland v. Bell, 39 Kan. 21, 17 Pac. 600; McLeod v. Barnum, 131 Cal. 605, 63 Pac. 924. *See "Vendor and Purchaser," Dec. Dig. (Key-No.) §§ 15, 308; Cent. Dig. §§ 16, 877–899.*

[64] Rice v. Grange, 131 N. Y. 149, 30 N. E. 46; Harmon v. Bird, 22 Wend. (N. Y.) 113; Perry v. Buckman, 33 Vt. 7; Potter v. Earnest, 45 Ind. 416; Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269; Blackman v. Dowling, 63 Ala. 304; Byrne v. Cummings, 41 Miss. 192; Daniel v. Tarver, 70 Ga. 203; Dowdy v. McLellan, 52 Ga. 408; Bean v. Proseus, 3 Cal. Unrep. 558, 31 Pac. 49; Topp v. White, 12 Heisk. (Tenn.) 165. *See "Contracts," Dec. Dig. (Key-No.) §§ 85, 86; Cent. Dig. §§ 399–402.*

[65] Rice v. Grange, 131 N. Y. 149, 30 N. E. 46. *See "Contracts," Dec. Dig. (Key-No.) §§ 85, 86; Cent. Dig. §§ 399–402.*

less because of improvements does not release the purchaser from liability for the purchase money.[66]

Recovery of Money Paid

Ordinarily, if a person voluntarily pays another money, he cannot maintain an action to recover it back. This rule, however, does not apply where money is paid under a contract, and the consideration fails. The money may be recovered back in such a case.[67]

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

254. Impossibility of performance arising subsequent to the formation of a contract does not discharge the promisor, even though he was not in fault, except—

EXCEPTIONS—(a) Where the impossibility is created by law.

(b) Where the subject-matter is destroyed, the rule being that, where the continued existence of a specific thing is essential to the performance of a contract, its destruction, from no default of either party, operates as a discharge.

(c) In case of incapacity for personal services, the rule being that a contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.[68]

(d) In some jurisdictions, where conditions essential to performance do not exist, the promisor is relieved from his obligation to perform, but this exception has not been recognized in most jurisdictions.

Obvious physical impossibility, or legal impossibility, which is apparent upon the face of the promise, avoids the contract. There is no question of discharge, for there has in fact never been a contract. The reason for this is, as we have seen, that the promise is an unreal consideration for any promise given in return.[69]

[66] Harmon v. Bird, 22 Wend. (N. Y.) 113. *See "Contracts," Dec. Dig. (Key-No.) §§ 83–86; Cent. Dig. §§ 388–402.*

[67] Giles v. Edwards, 7 T. R. 181; Claflin v. Godfrey, 21 Pick. (Mass.) 1; Steele v. Hobbs, 16 Ill. 59; Darst v. Brockway, 11 Ohio, 462; Foss v. Richardson, 15 Gray (Mass.) 303; Chapman v. City of Brooklyn, 40 N. Y. 372; Leach v. Tilton, 40 N. H. 473; Richter v. Stock Co., 129 Cal. 367, 62 Pac. 39. And see cases cited supra, notes 51–53. The obligation to repay is quasi contractual. See post, p. 640. *See "Contracts," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 399–401.*

[68] Anson, Cont. (4th Ed.) 320–325.

[69] Ante, p. 166.

Again, impossibility which arises from the nonexistence of the subject-matter of the contract avoids it.[70] Here, also, there is no question of discharge from a contract. The question is one of avoidance of the contract, and relates to its formation.

We are here to deal with those cases in which a valid contract has been made, but has become impossible of performance because of facts and circumstances arising subsequent to its formation. The general rule is that such impossibility, even though it arises without any fault on the part of the promisor, does not discharge him from his liability under the contract. Of course he cannot perform his promise, as that has become impossible; but this is no excuse, and he may be held liable as for failure to perform

As we have seen in speaking of conditions subsequent, the promisor may, by the terms of the contract, make the performance of his promise conditional upon its continued possibility, and if he does so the promisee takes the risk, and must bear the loss if performance becomes impossible. If, however, the promisor makes his promise unconditionally, it is his own lookout, and he takes the risk of being held liable, even though performance becomes impossible by reason of circumstances beyond his control.[71] "Where the contract is to do a thing which is possible in itself,

[70] Ante, p. 251.

[71] Paradine v. Jane, Aleyn, 26; Ford v. Cotesworth, L. R. 4 Q. B. 127; Kearon v. Pearson, 7 Hurl. & N. 386; The Harriman, 9 Wall. 161, 19 L. Ed. 629; Jones v. U. S., 96 U. S. 24, 24 L. Ed. 644; Jacksonville, M., P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Booth v. Mill Co., 60 N. Y. 487; Stees v. Leonard, 20 Minn. 494 (Gil. 448); Harrison v. Railway Co., 74 Mo. 364, 41 Am. Rep. 318; School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Adams v. Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Eugster v. West, 35 La. Ann. 119, 48 Am. Rep. 232; School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; Summers v. Hibbard, Spencer, Bartlett & Co., 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. Law, 240, 45 Atl. 693, 49 L. R. A. 572, 81 Am. St. Rep. 467; Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51; Rowe v. Town of Peabody, 207 Mass. 226, 93 N. E. 604; John Soley & Sons v. Jones, 208 Mass. 561, 95 N. E. 94; Gravel Switch, etc., Telephone Co. v. Lebanon, etc., Telephone Co., 139 Ky. 151, 129 S. W. 559. Where a person has contracted to build a house, he is neither excused from performance, nor entitled to recover for what he has done, by the fact that the house is destroyed by fire or other cause beyond his control, before its completion and acceptance by the owner. School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; Lawing v. Rintles, 97 N. C. 350, 2 S. E. 252; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Fildew v. Besley, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433; Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90. And see Bastrop, etc., Growers' Ass'n v. Cochran (Tex. Civ. App.) 138 S. W. 1188. *See "Contracts," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 1444–1446.*

the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control." [72]

In an old case, in which the plaintiff sued for rent due upon a lease, the defendant pleaded that a foreign prince had invaded the realm with a hostile army, and expelled defendant from the premises demised, whereby he could not take the profits out of which the rent should have come. The court held that this was no excuse, "and this difference was taken: that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. * * * But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." [73]

Exceptions to the Rule

The exceptions to the rule must be distinguished from the cases in which the act of God is said to excuse from nonperformance of a contract. There are, as we have seen, certain contracts into which the act of God is introduced as an express, or, by custom, an implied, condition subsequent absolving the promisor; but there are forms of impossibility which are said to excuse from performance because "they are not within the contract"—that is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither accepts them specifically nor promises unconditionally in respect of them.[74]

[72] Jones v. U. S., 96 U. S. 24, 24 L. Ed. 644. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[73] Paradine v. Jane, Aleyn, 26. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[74] Baily v. De Crespigny, L. R. 4 Q. B. at page 185. If the impossibility is caused by the act of the promisor, it does not excuse failure to perform. Ante, p. 562. The exceptions do not apply where a person has an option to perform his contract in either of two ways, and it becomes impossible of performance in one of the ways only. In such a case he must perform in the other way. State v. Worthington's Ex'rs, 7 Ohio, 171, pt. 1; Drake v. White, 117 Mass. 10; Jacquinet v. Boutron, 19 La. Ann. 30; Board of Education v. Townsend, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

Same—Legal Impossibility

Legal impossibility arising from a change in the law [75] or from the exercise of governmental authority [76] exonerates the promisor.[77] It was so held in an action on a covenant in a lease from the defendant to the plaintiff, by which the defendant agreed that neither he "nor his assigns" would, during the term, erect any but ornamental buildings on adjoining land, which had been retained by the defendant, but which was afterwards taken by a railroad company under legislative authority, and used for the erection of a station. "The legislature," it was said, "by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties." [78] This exception does not apply to the full extent where the impossibility created by a change in the law is only temporary. In such a case liability to perform is only suspended, and the promise must be performed when the impossibility ceases.[79]

[75] Otherwise if impossibility is created by foreign law. Bunker v. Hodgson, 8 Maule & S. 267; Tweedie Trading Co. v. James P. McDonald Co. (D. C.) 114 Fed. 985. Cf. O'Neil v. Armstrong, [1895] 2 Q. B. 70. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[76] Adler v. Miles, 69 Misc. Rep. 601, 126 N. Y. Supp. 135. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[77] Baily v. De Crespigny, L. R. 4 Q. B. 180; Cordes v. Miller, 39 Mich. 581, 33 Am. Rep. 430; Semmes v. Insurance Co., 13 Wall. 158, 20 L. Ed. 490; Brick Presbyterian Church v. City of New York, 5 Cow. (N. Y.) 538; Jones v. Judd, 4 N. Y. 411; Mississippi & T. R. Co. v. Green, 9 Heisk. (Tenn.) 588; American Mercantile Exchange v. Blunt, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022. And see Buffalo E. S. R. Co. v. Railroad Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284. A railroad company is relieved from further performance of a contract to give free transportation to certain persons in consideration of the conveyance of property by the passage of a statute forbidding the giving of free transportation. Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Cowley v. Northern Pac. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559. But there is no discharge when the law merely makes performance more burdensome, though not impossible. Baker v. Johnson, 42 N. Y. 126; Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee, 109 Ky. 408, 59 S. W. 332. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[78] Baily v. De Crespigny, L. R. 4 Q. B. 180. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[79] Hadley v. Clarke, 8 Term R. 259; Baylies v. Fettyplace, 7 Mass. 325. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. § 1417.*

In the case of property leased for the sale of intoxicating liquors, it has been held that the subsequent enactment of a law during the term of the lease forbidding the sale of intoxicating liquors terminates the lease.[80] The weight of authority, however, is to the contrary;[81] the majority holding being based on the ground that the sale of intoxicating liquors is well known to be subject to legal regulation and prohibition, and that the tenant is therefore not justly entitled to be relieved from his contract upon the happening of a contingency which he might have foreseen and protected himself against by express agreement. And the cases are agreed that the tenant is not relieved from further performance of the contract where the lease of the property is not for saloon purposes only.[82]

Legal impossibility may arise as well by action of the courts or by the executive as of the legislature, and in all such cases the contract is discharged. Thus, where an agent was under employment by an insurance company, and before expiration of the term the company was enjoined from doing business, and a receiver was appointed, at the instance of the state, the contract was discharged.[83] So, where a servant agreed with his master that if he left without giving two weeks' notice he should receive nothing for wages due, and was arrested and imprisoned for crime, it was held that he could nevertheless recover.[84] And where per-

[80] Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753. *See "Landlord and Tenant," Dec. Dig. (Key-No.) §§ 29, 34; Cent. Dig. §§ 85, 97; "Contracts," Cent. Dig. §§ 465, 513½; "Intoxicating Liquors," Cent. Dig. § 473.*

[81] Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co., 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498; O'Byrne v. Henley, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496. *See "Landlord and Tenant," Dec. Dig. (Key-No.) §§ 29, 34; Cent. Dig. §§ 85, 97.*

[82] Lawrence v. White, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N. S.) 966, 15 Ann. Cas. 1097; San Antonio Brewing Ass'n v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368; Kerley v. Mayer, 10 Misc. Rep. 718, 31 N. Y. Supp. 818 [affirmed, 155 N. Y. 636, 49 N. E. 1099]; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966; Barghman v. Portman (Ky.) 14 S. W. 342; Hecht v. Acme Coal Co., 19 Wyo. 18, 113 Pac. 788, 117 Pac. 132, 34 L. R. A. (N. S.) 773, 777, Ann. Cas. 1913E, 258; Shreveport Ice & Brewing Co. v. Mandel Bros., 128 La. 314, 54 South. 831. *See "Landlord and Tenant," Dec. Dig. (Key-No.) §§ 29, 34; Cent. Dig. §§ 85, 97.*

[83] People v. Insurance Co., 91 N. Y. 174. To the same effect, where performance is prevented by appointment of receiver and injunction. Malcomson v. Wappoo Mills (C. C.) 88 Fed. 680; Burkhardt v. School Tp., 9 S. D. 315, 69 N. W. 16. Contra, Spader v. Manufacturing Co., 47 N. J. Eq. 18, 20 Atl. 878; State v. Railroad Co., 61 Neb. 545, 85 N. W. 556. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[84] Hughes v. Wamsutta Mills, 11 Allen (Mass.) 201. But see Leopold v.

formance of a charter party for loading a cargo at a foreign port was prevented by a declaration of war rendering performance impossible without illegal trading with the enemy, the contract was discharged.[85]

Same—Destruction of the Subject-Matter

Where the continued existence of a specific thing is essential to the performance of the contract, its destruction from no fault of either party operates as a discharge.[86] A leading case on this subject was one in which the defendant had agreed to let the plaintiff have the use of a music hall for the purpose of giving concerts upon certain days. Before the days of performance arrived the hall was destroyed by fire, and the plaintiff sued the defendant for losses arising from the consequent breach of contract. The court held that, in the absence of any express stipulation on the matter, the parties must be taken "to have contemplated the continuing existence as the foundation of what was to be done," and that, therefore, "in the absence of any expressed or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing

Salkey, 89 Ill. 412, 31 Am. Rep. 93. *See "Contracts," Dec. Dig. (Key-No.) § 73; Cent. Dig. § 97.*

[85] Esposits v. Bowden, 7 El. & Bl. 763. *See "Contracts," Dec. Dig. (Key-No.) § 303; Cent. Dig. §§ 1409–1443.*

[86] Taylor v. Caldwell, 3 Best & S. 826; Lord v. Wheeler, 1 Gray (Mass.) 282; Walker v. Tucker, 70 Ill. 527; The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; Ward v. Vance, 93 Pa. 499. Cf. Nicol v. Fitch, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542. Most courts hold that, where a person has agreed to make repairs or do other work on a specific building or chattel, its destruction before the work is finished will discharge the contract, and the workman may recover for what he has done, and it is immaterial that the work was only to be paid for on completion. See Whelan v. Clock Co., 97 N. Y. 293; Hindrey v. Williams, 9 Colo. 371, 12 Pac. 436; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; Cleary v. Sohier, 120 Mass. 210; Cook v. McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765; Lord v. Wheeler, 1 Gray (Mass.) 282; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Haynes v. Baptist Church, 88 Mo. 285, 57 Am. Rep. 413; Weis v. Devlin, 67 Tex. 507, 8 S. W. 726, 60 Am. Rep. 38; Hysell v. Manufacturing Co., 46 W. Va. 158, 33 S. E. 95; Angus v. Scully, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318; Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098, affirmed, 162 N. Y. 610, 57 N. E. 1112. But see Appleby v. Myers, L. R. 2 C. P. 651; Brumby v. Smith, 3 Ala. 123; Siegel, Cooper & Co. v. Eaton & Prince Co., 165 Ill. 550, 46 N. E. 449; Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272. *See "Contracts," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 1444–1446.*

without default of the contractor." [87] Accordingly, where the contract is for the sale of specific goods, which perish without the seller's fault before the day appointed for delivery, the seller is excused from his obligation to deliver, and the buyer from his obligation to pay.[88] And a contract letting space in a department store is discharged by the destruction of the building in which the store is conducted.[89]

Same—Incapacity for Personal Services

A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.[90] In an action for damage sustained by a breach of

[87] Taylor v. Caldwell, 3 Best & S. 826. *See "Contracts," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 1444–1446.*

[88] Rugg v. Minett, 11 East, 210; Howell v. Coupland, 1 Q. B. Div. 258; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Thompson v. Gould, 20 Pick. (Mass.) 134, 139; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325; McMillan v. Fox, 90 Wis. 173, 62 N. W. 1052. So where goods are to be manufactured in particular factory, which is destroyed. Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. Or a crop is to be grown on a particular piece of land, and the crop fails. Howell v. Coupland, 1 Q. B. Div. 258. Otherwise where no particular land is specified. ANDERSON v. MAY, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642, Throckmorton Cas. Contracts, 404. *See "Sales," Dec. Dig. (Key-No.) § 172; Cent. Dig. §§ 425–430.*

[89] Martin Emerich Outfitting Co. v. Siegel, Cooper & Co., 237 Ill. 610, 86 N. E. 1104, 20 L. R. A. (N. S.) 1114 [affirming 141 Ill. App. 147], holding that the lessee is not entitled to space in another building in which the lessor had obtained a new location. *See "Contracts," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 1444–1446.*

[90] Boast v. Firth, L. R. 4 C. P. 1; Underwood v. Lewis [1894] 2 Q. B. 306; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Shultz v. Johnson's Adm'r, 5 B. Mon. (Ky.) 497; Harrington v. Iron-Works Co., 119 Mass. 82; Fuller v. Brown, 11 Metc. (Mass.) 440; Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62; Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444; Hubbard v. Belden, 27 Vt. 645; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; Smith v. Preston's Estate, 170 Ill. 179, 48 N. E. 688; Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821; Walsh v. Fisher, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865 (violence of strikers); Dow v. Bank, 88 Minn. 355, 93 N. W. 121. So the death of the employer discharges the employé from performance, Farrow v. Wilson, L. R. 4 C. P. 589; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578, but not necessarily the death of one of two joint employers. Martin v. Hunt, 1 Allen (Mass.) 419; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375. But the death of one member of a law firm which has contracted to conduct a case terminates the contract, the employment being personal. Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Baxter v. Billings, 83 Fed. 790, 28 C. C. A. 85. See, also, Hartford Fire Ins. Co. v. Wil-

contract on the part of a musician, who, having promised to perform at a concert, was prevented from doing so by a dangerous illness, the law governing the case was thus stated: "This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain incapacity of body or mind in the performer, without default on his or her part, is an excuse for nonperformance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so, and, as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional, and not absolute." [91]

On the same principle it has been held that where, from the prevalence of a contagious and fatal disease in the vicinity of the place where one has contracted to labor for a specified time, the danger is such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, it is a sufficient cause for not fulfilling the contract.[92] The rule that the death of a person discharges his contract to render personal services has been held not to apply where the services are of such a character that they may be just as well performed by his personal representative.[93] Where performance is thus rendered impossible by death or incapacity, the contractor or his personal representative may recover upon a quantum meruit, subject to the right of the defendant to have the recovery reduced by the amount of any loss which he may have suffered from nonperformance of the contract.[94] So the unearned portion of a consideration

cox, 57 Ill. 180; Salisbury v. Brisbane, 61 N. Y. 617; Martine v. Insurance Soc., 53 N. Y. 339, 13 Am. Rep. 529. *See "Master and Servant," Dec. Dig. (Key-No.) § 27; Cent. Dig. § 27.*

[91] Robinson v. Davison, L. R. 6 Exch. 269. *See "Master and Servant," Dec. Dig. (Key-No.) § 27; Cent. Dig. § 27.*

[92] Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77. But see Dewey v. School Dist., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206. *See "Contracts," Dec. Dig. (Key-No.) § 319; Cent. Dig. § 1496; "Schools and School Districts," Dec. Dig. (Key-No.) § 144; Cent. Dig. § 309.*

[93] Hawkins v. Ball's Adm'r, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755; Siler v. Gray, 86 N. C. 566; Janin v. Browne, 59 Cal. 37; BILLINGS' APPEAL, 106 Pa. 558, Throckmorton Cas. Contracts, 330; Howe Sewing Mach. Co. v. Rosensteel (C. C.) 24 Fed. 583; Shultz v. Johnson's Adm'r, 5 B. Mon. (Ky.) 497; Volk v. Stowell, 98 Wis. 385, 74 N. W. 118. And see generally for assignment of contractual obligations by death, ante p. 473. *See "Master and Servant," Dec. Dig. (Key-No.) § 28; Cent. Dig. § 27.*

[94] Patrick v. Putnam, 27 Vt. 759; Wolfe v. Howes, 20 N. Y. 197, 75 Am.

paid in advance for services the performance of which is prevented by the death or incapacitating illness of the promisor may be recovered from him or his estate.[95]

Same—Where Conditions Essential to Performance Do Not Exist

A fourth exception recognized in some cases is that performance of a contract will be excused where conditions essential to performance do not exist.[96] An illustration of this exception is found in a recent well-considered case in the New York Court of Claims,[97] in which it is said: "Where in the course of the construction of a canal natural conditions of soil unexpectedly appear, which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract, and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract." This exception has not been recognized in the majority of jurisdictions, but the tendency of the courts is to be more liberal than formerly in relieving a party from his obligation under a contract where performance has been rendered impossible without fault on his part.[98]

Same—Performance Prevented by the Promisee

If performance of a promise is prevented by the promisee, there is no breach of contract by the promisor.[99]

Dec. 388; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Green v. Gilbert, 21 Wis. 395; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 853. The right to recover except on full performance may be excluded by the express terms of the contract. Cutter v. Powell, 6 Term R. 320. *See "Master and Servant," Dec. Dig. (Key-No.) § 28; Cent. Dig. § 27.*

[95] Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.) 914, 17 Ann. Cas. 179. *See "Contracts," Dec. Dig. (Key-No.) § 311; Cent. Dig. §§ 1448–1456; "Master and Servant," Dec. Dig. (Key-No.) § 28; Cent. Dig. § 27.*

[96] Buffalo, etc., Land Co. v. Bellevue Land, etc., Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; Kinzer Construction Co. v. State (Ct. Cl.) 125 N. Y. Supp. 46; Article by Frederick C. Woodward, 1 Col. Law Rev. 529; 15 Harv. Law Rev. 63, 418. And see Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. *See "Contracts," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 1444–1446.*

[97] Kinzer Construction Co. v. State (Ct. Cl.) 125 N. Y. Supp. 46. *See "Contracts," Dec. Dig. (Key-No.) § 309; Cent. Dig. §§ 1444–1446.*

[98] See authorities cited supra, note 96.

[99] Black v. Woodrow, 39 Md. 194; Smith v. Alker, 102 N. Y. 87, 5 N. E. 791; ante, p. 586. *See "Contracts," Dec. Dig. (Key-No.) §§ 300, 303; Cent. Dig. §§ 1374, 1430–1433.*

April — 14th — 1904.

DISCHARGE BY OPERATION OF LAW

255. There are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract; as in case of

(a) Merger.
(b) Alteration of a written instrument.
(c) Proceedings in bankruptcy.

SAME—MERGER

256. Acceptance of a higher security in the place of a lower merges or extinguishes the lower, but

(a) The two securities must be different in their legal operation, the one of a higher efficacy than the other.
(b) The subject-matter of the two securities must be identical.
(c) The parties must be the same.

The merger of a lower in a higher security does not depend on the intention of the parties. The mere acceptance of the higher security ipso facto extinguishes the lower.[1] We shall presently see an instance of this form of discharge in the case of a judgment recovered in an action for breach of contract. The judgment extinguishes by merger the right of action arising from the breach. In like manner, if the parties to a simple contract embody its contents in a deed which they both execute, the simple contract is discharged.[2] In order to effect a merger, the two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security, taken in addition to one similar in character, will not affect its validity unless there be a discharge by substituted agreement.[3] It is

[1] Price v. Moulton, 10 C. B. 561; Jones v. Johnson, 8 Watts & S. (Pa.) 276, 38 Am. Dec. 760; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Keefer v. Zimmerman, 22 Md. 274; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; ante, p. 71. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[2] Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181; Howes v. Barker, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526; CLIFTON v. JACKSON IRON CO., 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621, Throckmórton Cas. Contracts, 406; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917. If, however, the deed is accepted by the vendee, not as in full performance, but only as performance pro tanto of the contract of sale, it does not discharge the contract. Read v. Loftus, 82 Kan. 485, 108 Pac. 850, 31 L. R. A. (N. S.) 457, and note. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[3] Higgen's Case, 6 Coke, 45b; Andrews v. Smith, 9 Wend. (N. Y.) 53;

also necessary that the subject-matter of the two securities shall be identical,[4] and that the parties shall be the same.[5] Even a security of a higher nature, if it is taken expressly as a collateral security, will not extinguish the inferior.[6]

It is often said that where a simple oral contract is reduced to writing the written contract merges the oral agreement, but the term "merger" is thus used in a different sense. A simple contract in writing is of no higher nature than a simple contract by word of mouth. What is meant is simply that where the parties have reduced their contract to writing they cannot vary or add to it by parol evidence. It is simply a question of evidence.[7] Again, one simple contract may be substituted for another. In such case, however, there is no discharge by operation of law, but the substitution depends upon the intention of the parties.[8]

SAME—ALTERATION OF A WRITTEN INSTRUMENT

257. If a deed or contract in writing is altered by addition or erasure, it is discharged, provided the alteration is made—

(a) In a material part, so that it changes the legal effect of the instrument. It need not necessarily be prejudicial.
(b) By a party to the contract, or by a stranger with his consent.
(c) Intentionally.
(d) Without the consent of the other party.

The alteration of a deed, or of a simple contract in writing, if made under the circumstances stated above, will operate as a discharge of the contract, the law imposing this severe penalty as a safeguard against tampering with written instruments.[9] The alteration,

Gregory v. Thomas, 20 Wend. (N. Y.) 17; Bill v. Porter, 9 Conn. 23; ante, pp. 71, 546; *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[4] Holmes v. Bell, 8 Man. & G. 213; Witbeck v. Waine, 16 N. Y. 532. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[5] Hooper's Case, 2 Leon. 110; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Doty v. Martin, 32 Mich. 462. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[6] Day v. Leal, 14 Johns. (N. Y.) 404; Butler v. Miller, 1 Denio (N. Y.) 407. And see the cases cited in the preceding note; ante, p. 71, note 50. *See "Contracts," Dec. Dig. (Key-No.) § 245; Cent. Dig. §§ 1129, 1130.*

[7] Ante, p. 490.

[8] 9 Cyc. Law & Proc. 635; ante, p. 71.

[9] Suffell v. Bank, 9 Q. B. Div. 555; WOOD v. STEELE, 6 Wall. 80, 18 L. Ed. 725, Throckmorton Cas. Contracts, 407; Angle v. Insurance Co., 92 U. S. 330, 23 L. Ed. 556; Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed.

to have this effect, must be material; that is, it must change the legal effect of the instrument.[10] Whether it is material or not must, of course, depend upon the character of the instrument. Adding words of negotiability to a note or changing or cutting from a note a memorandum limiting its effect as a negotiable instrument or otherwise,[11] or in any way altering it so as to destroy or change its negotiability;[12]

641; Osgood v. Stevenson, 143 Mass. 399, 9 N. E. 825; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Kilkelly v. Martin, 34 Wis. 525; Montag v. Linn, 23 Ill. 551; Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661; Marsh v. Griffin, 42 Iowa, 403; Ætna Nat. Bank v. Winchester, 43 Conn. 391; Morrison v. Garth, 78 Mo. 434; Johnson v. Moore, 33 Kan. 90, 5 Pac. 406. Alteration nullifies a negotiable instrument even against a bona fide purchaser. Master v. Miller, 4 T. R. 320; Burchfield v. Moore, 3 El. & Bl. 683; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Horn v. Bank, 32 Kan. 518, 4 Pac. 1022; Gettysburg Nat. Bank v. Chisholm, 169 Pa. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Exchange Nat. Bank v. Bank, 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 686; Seebolt v. Tatlie, 76 Minn. 131, 78 N. W. 967. This rule has been modified in many states by the Negotiable Instruments Law, so as to enable a holder in due course to enforce the instrument against a party making, authorizing, or assenting to the alteration and subsequent indorsers. Norton, Bills & N. (3d Ed.) 246. *See "Alteration of Instruments," Dec. Dig. (Key-No.) §§ 16–18; Cent. Dig. §§ 114–145.*

[10] Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600 (collecting cases); Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177; Birdsall v. Russell, 29 N. Y. 220; Manufacturers' Bank v. Follett, 11 R. I. 92, 23 Am. Rep. 418; Wessell v. Glenn, 108 Pa. 104; Miller v. Reed, 27 Pa. 244, 67 Am. Dec. 459; Palmer v. Largent, 5 Neb. 223, 25 Am. Rep. 479; Leonard v. Phillips, 39 Mich. 182, 33 Am. Rep. 370. Filling blanks with name of party, or more specific description of property, will not avoid contract, since it does not change legal effect. Briscoe v. Reynolds, 51 Iowa, 673, 2 N. W. 529; Rowley v. Jewett, 56 Iowa, 492, 9 N. W. 353. Figures in margin being no part of the note, their alteration is immaterial. Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39. It has been held in England that, though in a bank note the promise to pay made by the bank is not touched by an alteration in the number of the note, the fact that a bank note is a part of the currency, and that the number placed on it is put to important uses by the bank and by the public for the detection of forgery and theft, causes an alteration in the number to be material, and to invalidate the note. Suffell v. Bank, 9 Q. B. Div. 555. Contra, as to bonds. Birdsall v. Russell, 29 N. Y. 220; City of Elizabeth v. Force, 29 N. J. Eq. 587. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 1–4.*

[11] Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Gerrish v. Glines, 56 N. H. 9; Johnson v. Heagan, 23 Me. 329; Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; Cochran v. Nebeker, 48 Ind. 459; Davis v. Henry, 13 Neb. 497, 14 N. W. 523; Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 18–29.*

[12] Booth v. Powers, 56 N. Y. 22; Union Nat. Bank v. Roberts, 45 Wis. 373; Needles v. Shaffer, 60 Iowa, 65, 14 N. W. 129; Belknap v. Bank, 100 Mass.

altering an instrument by erasing, crossing out, or otherwise canceling a material part thereof, without the substitution of new matter;[13] under some circumstances, adding a seal to an instrument, or effacing a seal,[14] changing the date of a note or other security,[15] or the time of payment,[16] or the place of payment,[17] or the amount to be paid, either by lessening or increasing the principal,[18] or by changing the rate of interest, or adding a provision for interest;[19] adding to or withdrawing from an instrument the name of a maker, drawer, or, according to some of the cases, a surety, after the instrument has been executed[20]—are all material alterations. But "an alteration which

376, 97 Am. Dec. 105. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 18–29.*

[13] O. N. Bull Remedy Co. v. Clark, 109 Minn. 396, 124 N. W. 20, 32 L. R. A. (N. S.) 519, 18 Ann. Cas. 413. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 18–29.*

[14] Davidson v. Cooper, 11 Mees. & W. 778, 13 Mees. & W. 343; Rawson v. Davidson, 49 Mich. 607, 14 N. W. 565. Under some circumstances and in some jurisdictions, the seal may make no difference. Truett v. Wainwright, 4 Gilman (Ill.) 411; White v. Fox, 29 Conn. 570. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 44.*

[15] WOOD v. STEELE, 6 Wall. 80, 18 L. Ed. 725, Throckmorton Cas. Contracts, 407; Vance v. Lowther, 1 Exch. Div. 176; Walton v. Hastings, 4 Camp. 223; Outhwaite v. Luntley, Id. 179; Hamilton v. Wood, 70 Ind. 306; Britton v. Dierker, 46 Mo. 591, 2 Am. Rep. 553; Crawford v. Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; Miller v. Gilleland, 19 Pa. 119. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 30–33.*

[16] Lee v. Murdock, 4 Pat. App. 261; Alderson v. Langdale, 3 Barn. & Adol. 660; Lewis v. Kramer, 3 Md. 265; Benedict v. Miner, 58 Ill. 19; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Seebold v. Tatlie, 76 Minn. 131, 78 N. W. 967. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 30–33.*

[17] Woodworth v. Bank, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; Whitesides v. Bank, 10 Bush (Ky.) 501, 19 Am. Rep. 74; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808; Townsend v. Wagon Co., 10 Neb. 615, 7 N. W. 274, 35 Am. Rep. 493; White v. Hass, 32 Ala. 430, 70 Am. Dec. 549. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 30–33.*

[18] Goodman v. Eastman, 4 N. H. 455; Bank of Commerce v. Bank, 3 N. Y. 230. Or by altering currency in which note is payable. Darwin v. Rippey, 63 N. C. 318; Martendale v. Follett, 1 N. H. 95; Schwalm v. McIntyre, 17 Wis. 232. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 16, 17.*

[19] Warrington v. Early, 2 El. & Bl. 763; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372; Weyerhauser v. Dun, 100 N. Y. 150, 2 N. E. 274; Benedict v. Miner, 58 Ill. 19; Ivory v. Michael, 33 Mo. 398; Lee v. Starbird, 55 Me. 491; Woodworth v. Anderson, 63 Iowa, 503, 19 N. W. 296; Kilkelly v. Martin, 34 Wis. 525; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Davis v. Henry, 13 Neb. 497, 14 N. W. 523; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Fay v. Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 16, 17.*

[20] Bank of Limestone v. Penick, 5 T. B. Mon. (Ky.) 25; Pulliam v. With-

only does what the law would do—that is, only expresses what the law implies—is not a material alteration, and therefore would not avoid an instrument." [21] It is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. If, for instance, after the execution and delivery of an unattested bond, the obligee should fraudulently, and with a view to some improper advantage, procure a person who was not present at the execution of the instrument to sign his name thereto as an attesting witness, the obligor would be discharged.[22] The alteration is material in that it might allow proof of the execution of the bond by proving such person's handwriting.[23]

"It is not to the point that the alteration be or be not to the prejudice of the party against whom the liability is sought to be enforced. The courts will not sit in judgment upon the question whether it be to the prejudice of the party aggrieved or not." [24]

ers, 8 Dana (Ky.) 98, 33 Am. Dec. 479; Martin v. Thomas, 24 How. 315, 16 L. Ed. 689; Gardner v. Walsh, 32 Eng. Law & Eq. 162; Smith v. United States, 2 Wall. 219, 17 L. Ed. 788; Henry v. Coats, 17 Ind. 161; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Sullivan v. Rudisill, 63 Iowa, 158, 18 N. W. 856; Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229. It seems, however, according to the weight of authority in this country, that the addition of the signature of a surety or guarantor, not a joint maker (but see Brownell v. Winnie, 29 N. Y. 400, 86 Am. Dec. 341), does not discharge the maker of a note. Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641; Stone v. White, 8 Gray (Mass.) 589; McCaughey v. Smith, 27 N. Y. 39; Montgomery R. Co. v. Hurst, 9 Ala. 518; Wallace v. Jewell, 21 Ohio St. 172, 8 Am. Rep. 48; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306. And it has been held that obtaining signature of second surety does not discharge first surety. Ward v. Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; Keith v. Goodwin, 31 Vt. 268, 73 Am. Dec. 345; Sampson v. Barnard, 98 Mass. 359. Changing indorser into guarantor is material. Belden v. Hann, 61 Iowa, 42, 15 N. W. 591. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 16, 17.*

[21] 2 Pars. Cont. 720; Aldous v. Cornwell, L. R. 3 Q. B. 573; Brown v. Pinkham, 18 Pick. (Mass.) 172; Rudesill v. Jefferson Co. Court, 85 Ill. 446; Houghton v. Francis, 29 Ill. 244; First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748; Bank of Genesee v. Patchin Bank, 13 N. Y. 309. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 1–4.*

[22] Adams v. Frye, 3 Metc. (Mass.) 103; Marshall v. Gougler, 10 Serg. & R. (Pa.) 164. So of promissory note. Brackett v. Mountfort, 12 Me. 72; Thornton v. Appleton, 29 Me. 298; Homer v. Wallis, 11 Mass. 310, 6 Am. Dec. 169; Smith v. Dunham, 8 Pick. (Mass.) 246. Contra in case of note. Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600 (distinguishing some of cases above cited). *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 40–46.*

[23] Ante, p. 486.

[24] Norton, Bills & N. (3d Ed.) 252; Chappell v. Spencer, 23 Barb. (N. Y.) 584; Gardner v. Walsh, 5 El. & Bl. 83; Martin v. Thomas, 24 How. 315, 16 L.

By Whom

It was at one time held in England that any material alteration by a stranger would discharge the contract, and even now it seems to be there held that such an alteration will operate as a discharge, if it was made for the benefit of a party to the contract, and while the instrument was in the party's possession, whether the party knew of or consented to the alteration or not.[25] The doctrine is not recognized to any extent, if at all, in this country. On the contrary, it is held that alteration by a stranger, without the knowledge or consent of the parties, is a mere spoliation, and does not discharge the contract.[26]

Intent

The alteration, to effect a discharge, must be intentional. An alteration by accident or mistake, occurring under such circumstances as to negative the idea of intention, will not invalidate the document.[27] Though there are some cases to the contrary, by the weight of authority, in so far as the instrument itself is concerned, it is immaterial whether the alteration was with fraudulent intent or not. Innocent but intentional alteration destroys its efficacy. An alteration, however, without fraudulent intent, will not prevent recovery on the original consideration for the instrument. Where a bill, note, or other security is given for a valuable consideration existing independently of the instrument, it is generally held that an alteration of the note or bill in a material part by the holder without authority of the maker prevents a recovery upon the instrument, whether the alteration was with or without fraudulent intent.[28] If the alteration was made with

Ed. 689; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 1–4.*

[25] Anson, Cont. (4th Ed.) 327; Pigot's Case, 11 Rep. 27; Davidson v. Cooper, 11 Mees. & W. 778, 13 Mees. & W. 343. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 11; Cent Dig. §§ 57–72.*

[26] Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Martin v. Insurance Co., 101 N. Y. 498, 5 N. E. 338; United States v. Spalding, 2 Mason, 478, Fed. Cas. No. 16,365; Yeager v. Musgrave, 28 W. Va. 90; Drum v. Drum, 133 Mass. 566; Church v. Fowle, 142 Mass. 12, 6 N. E. 764; Nichols v. Johnson, 10 Conn. 192; Bigelow v. Stilphen, 35 Vt. 521; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Wickes' Lessee v. Caulk, 5 Har. & J. (Md.) 36; Condict v. Flower, 106 Ill. 105; Hunt v. Gray, 35 N. J. Law, 227, 10 Am. Rep. 232; Piersol v. Grimes, 30 Ind. 129, 95 Am. Dec. 673; Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Moore v. Ivers, 83 Mo. 29; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; Fullerton v. Sturges, 4 Ohio St. 530; White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 57–72.*

[27] Wilkinson v. Johnson, 3 Barn. & C. 428; Raper v. Birkback, 15 East, 17: Horst v. Wagner, 43 Iowa, 373, 22 Am. Rep. 255; Van Brunt v. Eoff, 35 Barb. (N. Y.) 501; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 73–76.*

[28] Alderson v. Langdale, 3 Barn. & Adol. 660; Heath v. Blake, 28 S. C. 406,

fraudulent intent, there can be no recovery, even on the original consideration;[29] but recovery on the original consideration may be had if the alteration was innocent.[30]

Consent

If the alteration is with the consent of the party claiming a discharge, or if it is afterwards ratified by him, there is no discharge.[31] It follows that where there are several promisors or obligors, and some consent, those so consenting remain bound, but those who do not consent are discharged.[32]

5 S. E. 842; WOOD v. STEELE, 6 Wall. 80, 18 L. Ed. 725, Throckmorton Cas. Contracts, 407; Adams v. Frye, 3 Metc. (Mass.) 103; Eckhert v. Pickel, 59 Iowa, 545, 13 N. W. 708. Contra, Van Brunt v. Eoff, 35 Barb. (N. Y.) 501; Foote v. Hambrick, 70 Miss. 157, 11 South. 567, 35 Am. St. Rep. 631; Wallace v. Tice, 32 Or. 283, 51 Pac. 733. Signing as attesting witness. Thornton v. Appleton, 29 Me. 298; Milberry v. Storer, 75 Me. 69, 46 Am. Rep. 361. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 73–76.*

[29] Meyer v. Huneke, 55 N. Y. 412; Smith v. Mace, 44 N. H. 553; Warder, Bushnell & Glessner Co. v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; Ballard v. Insurance Co., 81 Ind. 239; Walton Plow Co. v. Campbell, 35 Neb. 174, 52 N. W. 883, 16 L. R. A. 468; Hunt v. Gray, 35 N. J. Law, 227, 10 Am. Rep. 232; Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; Maguire v. Eichmeier, 109 Iowa, 301, 80 N. W. 395. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 73–76.*

[30] Sloman v. Cox, 1 Cromp., M. & R. 471; Hunt v. Gray, 35 N. J. Law, 227, 10 Am. Rep. 232; Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Sullivan v. Rudisill, 63 Iowa, 158, 18 N. W. 856; Keene v. Weeks, 19 R. I. 309, 33 Atl. 446; Gorden v. Robertson, 48 Wis. 493, 4 N. W. 579; Savage v. Savage, 36 Or. 268, 59 Pac. 461. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 11; Cent. Dig. §§ 73–76.*

[31] Stoddard v. Penniman, 113 Mass. 386; Commercial Bank v. Warren, 15 N. Y. 577; Booth v. Powers, 56 N. Y. 22; Stiles v. Probst, 69 Ill. 382; Hanson v. Crawley, 41 Ga. 303; Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 380; McRaven v. Crisler, 53 Miss. 542; National State Bank v. Rising, 4 Hun (N. Y.) 793; Duker v. Franz, 7 Bush (Ky.) 273, 3 Am. Rep. 314; Speake v. United States, 9 Cranch, 28, 3 L. Ed. 645; Collins v. Collins, 51 Miss. 311, 24 Am. Rep. 632; Jackson v. Johnson, 67 Ga. 167; Canon v. Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; Payne v. Long, 121 Ala. 385, 25 South. 780. An instrument is not avoided by inserting a provision for interest at the rate it was intended to bear, First Nat. Bank v. Carson, 60 Mich. 432, 27 N. W. 589; nor by filling blanks with names of parties, place of payment, or otherwise, as intended by the parties, Briscoe v. Reynolds, 51 Iowa, 673, 2 N. W. 529; Gillaspie v. Kelly, 41 Ind. 158, 13 Am. Rep. 318; Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 77–92.*

[32] Gardiner v. Harbeck, 21 Ill. 129; Myers v. Nell, 84 Pa. 369; State v. Van Pelt, 1 Ind. 304; Warring v. Williams, 8 Pick. (Mass.) 322; Davis v. Bauer, 41 Ohio St. 257; Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331. *See "Alteration of Instruments," Dec. Dig. (Key-No.) § 12; Cent. Dig. §§ 77–92.*

Loss of Instrument

The loss of an instrument only affects the rights of the parties in so far as it occasions a difficulty of proof, except that, in case of the loss of a negotiable instrument, the holder, if he loses it, loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.[33]

SAME—BANKRUPTCY

258. Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.

Discharge by bankruptcy proceedings operates, not to discharge the contract itself, but rather as a bar to a right of action upon it.[34] It is wholly a matter of statutory regulation, and need not be further mentioned.

REMEDIES ON BREACH OF CONTRACT

259. Where a contract is broken by one of the parties, the other party acquires, or may acquire, three distinct rights:

(a) He may be discharged from further performance.

(b) If he has done anything under the contract, he has a right to sue on the quantum meruit, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law.

(c) He has a right of action on the original contract, or term of the contract broken, and may maintain:

(1) A suit to obtain damages for the loss sustained by the breach.

(2) A suit to obtain specific performance of the contract by the other party.[35]

We have seen that if a contract is discharged by the breach the party injured is exonerated from further performance, provided he treats the breach as a discharge. Where he relies on a discharge, his remedy is by setting up his discharge as a defense in an action

[33] Hansard v. Robinson, 7 Barn. & C. 90; Conflans Quarry Co. v. Parker, L. R. 3 C. P. 1. *See "Lost Instruments," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–5.*

[34] Collier on Bankruptcy (9th Ed.) 314, 404, 405.

[35] Anson, Cont. (4th Ed.) 308, 309.

brought by the other party on the contract. In addition to his right to a discharge from performance, he has a right, if he has done anything under the contract, to sue on the quantum meruit for compensation for his partial performance.[86] This cause of action is distinct from that arising out of the original contract. It is based upon a new contract, generally called an implied contract, but really a quasi contract, or contract created by law, because of the receipt by the other party of the benefits of such performance. In addition to these rights, the party so injured by a breach has a right of action based upon the original contract or term of the contract broken. This remedy exists not only where he is discharged by the breach, but also where he is not discharged, or where, though he was entitled to claim a discharge, he has preferred to waive such right, and go on with the contract. His remedy in this case is of two kinds: (1) He may seek, in a court of law, to obtain damages for the loss he has sustained by himself taking the initiative and bringing an action for damages, or by waiting until the other party sues him, and then asserting his right by way of recoupment, counterclaim, or cross action. He may resort to this remedy whether he claims a discharge by reason of the other's breach or not. (2) He may, in the case of certain contracts and under special circumstances, obtain specific performance of the contract by the other party, by bringing a suit in equity for that purpose. Of course he would not be entitled to such performance unless he performed the contract on his part, or offered to perform it, and therefore he cannot resort to this remedy where he claims a discharge from further performance.

We shall only treat of these two remedies in the most general way, and give briefly some of the elementary rules, for they do not properly come within the scope of our work.

[86] Ante, p. 586; Phillips v. Wiginton, 1 Ad. & E. 333; Prickett v. Badger, 1 C. B. (N. S.) 296; Howard v. Daly, 61 N. Y. 362, 369, 19 Am. Rep. 285; Derby v. Johnson, 21 Vt. 17; Brinkley v. Swicegood, 65 N. C. 626; Britt v. Hays, 21 Ga. 157; Urquhart v. Mortgage Co., 85 Minn. 69, 88 N. W. 264. See, also, ante, p. 590. *See "Work and Labor," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 23, 24; "Contracts," Cent. Dig. §§ 1476–1478.*

SAME—DAMAGES [37]

260. Every breach of contract entitles the party injured to sue for damages.

261. The rule as to the measure of damages is that the plaintiff is, so far as money can do it, to be placed in the same situation as if the contract had been performed. If he has suffered no actual loss, he is entitled to nominal damages. But—

LIMITATION OF RULE—The damages recoverable are only such as might have been supposed by the parties to be the natural result of the breach.

262. The parties may assess the damages themselves by provision in the contract, but they cannot provide for a penalty.

263. Damages are by way of compensation, and not of punishment, and, as a rule, only the pecuniary loss can be recovered; but—

EXCEPTION—There is an exception in case of the breach of a promise to marry.

The damages awarded for a breach of contract should represent the loss actually sustained, the rule of the common law being, as stated above, that a party who has been injured by a breach of contract "is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." [38] Every breach of contract gives the injured party a right of action, and the right to a verdict in his favor; but, if no actual loss at all accrues from the breach, he is only entitled to nominal damages,—that is, "a sum of money that may be spoken of, but that has no existence in point of quantity." [39]

Remote and Proximate

The rule just stated is subject to the limitation that only such damages can be recovered as can be deemed to have been in the

[37] See Anson, Cont. (4th Ed.) 309–312.

[38] Per Parke, B., in Robinson v. Harman, 1 Exch. 855. And see Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Cutting v. Railway Co., 13 Allen (Mass.) 381; Croucher v. Oakman, 3 Allen (Mass.) 185. *See "Damages," Dec. Dig. (Key-No.) §§ 117–119; Cent. Dig. §§ 285–290.*

[39] Per Maule, J., in Beaumont v. Greathead, 2 C. B. 494. And see Excelsior Needle Co. v. Smith, 61 Conn. 56, 23 Atl. 693; Horton v. Bauer, 129 N. Y. 148, 29 N. E. 1; Watts v. Weston, 62 Fed. 136, 10 C. C. A. 302; Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Weber v. Squier, 51 Mo. App. 601. *See "Damages," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 7–15.*

contemplation of the parties. The breach of a contract may result in losses which neither party contemplated or could contemplate at the time the contract was entered into, and the courts have striven to lay down rules by which the limit of damages may be ascertained. The limit must depend upon the nature of the particular contract, and only the most general rules can be laid down. It is said that "the damages to which the plaintiff is entitled are such as might have been supposed by the parties to be the natural result of a breach of the contract; such as might have been in their contemplation when the contract was made." [40] Any special loss which might accrue from a breach of contract, but which would not naturally and obviously flow therefrom, must, to be recoverable, be expressly provided for in making the contract. In a leading case,[41] the rules were thus stated: That where a party has broken his contract the damages which the other party should recover should be (1) such as may fairly and reasonably be considered to arise naturally—that is, according to the usual course of things—from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach; [42] that (2) if the damages arose out of special circumstances, communicated and so known to both parties when the contract was made, the damages which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances so known and communicated; [43] but (3) if the special circumstances were whol-

[40] Anson, Cont. (4th Ed.) 310; Hadley v. Baxendale, 9 Exch. 341; Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85. *See "Damages," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 37–53.*

[41] Hadley v. Baxendale, 9 Exch. 341. *See "Damages," Dec. Dig. (Key-No.) §§ 18, 19; Cent. Dig. §§ 37–53.*

[42] Cutting v. Railway Co., 13 Allen (Mass.) 381; Clark v. Moore, 3 Mich. 63; Carnegie v. Holt, 99 Mich. 606, 58 N. W. 623; Booth v. Mill Co., 60 N. Y. 487; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; Blagen v. Thompson, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315; Fleming v. Beck, 48 Pa. 309; True v. Telegraph Co., 60 Me. 9, 11 Am. Rep. 156; Hurd v. Dunsmore, 63 N. H. 171. Interest should be allowed on damages from the time of their accrual. International Contracting Co. v. McNichol (C. C.) 105 Fed. 553; Watkins v. Junker, 90 Tex. 584, 40 S. W. 11. *See "Damages," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 58, 62.*

[43] Smeed v. Foord, 1 El. & El. 602; Booth v. Mill Co., 60 N. Y. 487; Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129; Shepard v. Gaslight Co., 15 Wis. 318, 82 Am. Dec. 679; King v. Woodbridge, 34 Vt. 565; Smith v. Railroad Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166; Illinois Cent. R. Co. v Cobb, 64 Ill. 128; Watson v. Inhabitants of Needham, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287. Mere communication of special circumstances is not

ly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any such special circumstances.[44]

Vindictive, Punitive, or Exemplary Damages

Damages in an action for breach of contract are by way of compensation for the loss sustained by the breach, and never by way of punishment; and the plaintiff, therefore, cannot recover more than his pecuniary loss. This is the general rule, but it is subject to an exception in case of a breach of promise of marriage. In such a case, if the promise was broken abruptly, and under humiliating circumstances, or if the defendant acted maliciously and in a way to injure the plaintiff's character, exemplary damages may be recovered.[45]

Assessment by the Parties

The parties to a contract frequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. They have the right to do this, but, as we have already seen, they cannot provide for a penalty to be paid by the one who shall break the contract.[46]

enough unless given under such circumstances as reasonably to imply that it formed the basis of the agreement; that is, unless the circumstances were such that it might be supposed that a reasonable man would have had them in contemplation as a probable result of a breach. British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499; Horne v. Railway, 7 C. P. 583, 591; Booth v. Mill Co., 60 N. Y. at page 496; Bridges v. Stickney, 38 Me. 361; McKinnon v. McEwan, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458; Snell v. Cottingham, 72 Ill. 161; Friend & T. Lumber Co. v. Miller, 67 Cal. 464, 8 Pac. 40. *See "Damages," Dec. Dig. (Key-No.) § 23; Cent. Dig. §§ 58, 62.*

[44] Cory v. Ship Bldg. Co., L. R. 3 Q. B. 181; British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499; Bartlett v. Blanchard, 13 Gray (Mass.) 429; Billmeyer v. Wagner, 91 Pa. 92; Paine v. Sherwood, 19 Minn. 315 (Gil. 270); Mihills Mfg. Co. v. Day, 50 Iowa, 250; Peace River Phosphate Co. v. Graffiin (C. C.) 58 Fed. 550; Rochester Lantern Co. v. Press Co., 135 N. Y. 209, 31 N. E. 1018; Thomas, B. & W. Mfg. Co. v. Railway Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725; Buffalo Barb-Wire Co. v. Phillips, 64 Wis. 338, 25 N. W. 208. *See "Damages," Dec. Dig. (Key-No.) §§ 22, 23; Cent. Dig. §§ 58–62.*

[45] Southard v. Rexford, 6 Cow. (N. Y.) 254; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745. Cf. Clement v. Brown, 57 Minn. 314, 59 N. W. 198. But mere proof of breach of contract of marriage without aggravating circumstances is not sufficient to authorize exemplary damages. Baumle v. Verde, 33 Okl. 243, 124 Pac. 1083, 41 L. R. A. (N. S.) 840 and note. *See "Damages," Dec. Dig. (Key-No.) §§ 57, 87; Cent. Dig. §§ 188–192.*

[46] Ante, p. 515.

Difficulties in Assessment—Speculative Damages

The mere fact that the ascertainment of the damages is difficult cannot deprive him of his right to whatever damages he has suffered as the natural consequence of the breach; the difficulty, when it arises, must be met by the jury. Thus, where a manufacturer, who was in the habit of sending his goods for exhibition to agricultural shows, and made a profit by the practice, intrusted goods to a carrier to be sent to a show, under circumstances which should have brought his object to its notice, and they delayed the goods so that they were too late for exhibition, it was held that, though the ascertainment of damages was difficult and speculative, this was no reason for not giving damages.[47] It is generally held, however, that while profits which would have been realized but for the breach of contract may be allowed as a proper element of damages,[48] they must be proved with reasonable certainty, and not be merely conjectural, and that speculative or contingent profits cannot be recovered.[49]

SAME—SPECIFIC PERFORMANCE

264. A suit in equity will, as a rule, lie for specific performance of a contract, except—

EXCEPTIONS—(a) Where there is an adequate remedy at law.
(b) Where the matter of the contract is such that the court cannot supervise performance.
(c) Where the enforcement of specific performance would be inequitable and unjust.

[47] Simpson v. Railway Co., 1 Q. B. Div. 274. And see Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1023, 18 L. R. A. 385. *See "Damages," Dec. Dig. (Key-No.) § 22; Cent. Dig. §§ 59–61.*

[48] Wells v. National Life Ass'n of Hartford, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 83, and note; Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603, 6 Ann. Cas. 973. *See "Damages," Dec. Dig. (Key-No.) § 40; Cent. Dig. §§ 72–88.*

[49] Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Dennis v. Maxfield, 10 Allen (Mass.) 138; U. S. v. BEHAN, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, Throckmorton Cas. Contracts, 409; Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Ætna Life Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Allis v. McLean, 48 Mich. 428, 12 N. W. 640; Howe Mach. Co. v. Bryson, 44 Iowa, 159, 24 Am. Rep. 735; Hubbard v. Rowell, 51 Conn. 423; Rice v. Caudle, 71 Ga. 605; Lewis v. Insurance Co., 61 Mo. 534; Danforth v. Railroad Co., 99 Ala. 331, 13 South. 51. *See "Damages," Dec. Dig. (Key-No.) § 40; Cent. Dig. §§ 72–88.*

The courts of common law have no power to compel specific performance, and specific performance is often the only adequate remedy. This remedy, however, is given by courts of equity. They can enforce a promise to do a thing by a decree for specific performance, and a promise to forbear from doing a thing by an injunction.

The exercise of this jurisdiction by courts of equity is limited by certain rules, some of which we have already noticed in other connections.[50] The subject being one relating more peculiarly to the jurisdiction of courts of equity, we can only deal with it in a very general way.

Adequate Remedy at Law

A suit for specific performance will not lie if there is an adequate remedy at law. It will only lie where the loss cannot be compensated in damages.[51] This rule is well illustrated by the different attitudes which the court has assumed in this matter towards contracts for the sale of land and contracts for the sale of goods. One who has contracted to purchase a particular piece of land may be unable to get its exact counterpart elsewhere, with the same surroundings and conveniences. Courts of equity will therefore generally grant specific performance of contracts for the sale of land.[52] On the other hand, goods of the kind and quality contracted for are generally to be purchased elsewhere. Hence specific performance of a contract for the sale of goods will not be decreed,[53] except in the case of specific chat

[50] Ante, pp. 73, 208, 292.

[51] Campbell v. Potter, 147 Ill. 576, 35 N. E. 364; American Box Mach. Co. v. Crossman, 61 Fed. 888, 10 C. C. A. 146; Gove v. City of Biddleford, 85 Me. 393, 27 Atl. 264; Porter v. Water Co., 84 Me. 195, 24 Atl. 814; McCarter v. Armstrong, 32 S. C. 203, 10 S. E. 953, 8 L. R. A. 625. *See "Specific Performance," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 5–8.*

[52] Eastern C. R. Co. v. Hawkes, 5 H. L. 331, 359; Johnston v. Wadsworth, 24 Or. 494, 34 Pac. 13. But courts of equity will not even compel specific performance of a contract to buy land simply to enforce payment of the purchase money. Holley v. Anness, 41 S. C. 349, 19 S. E. 646. *See "Specific Performance," Dec. Dig. (Key-No.) § 65; Cent. Dig. § 196.*

[53] Cuddee v. Rutter, 1 P. Wms. 569, 5 Vin. Abr. p. 538, § 21, 1 White & T. Lead. Cas. Eq. [4th Am. Ed.] 1063; Lining v. Geddes, 1 McCord, Eq. (S. C.) 304, 16 Am. Dec. 606; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Kimball v. Morton, 5 N. J. Eq. 26, 53 Am. Dec. 621; Rollins Inv. Co. v. George (C. C.) 48 Fed. 776. A contract for the sale of shares of corporate stock will not be specifically enforced unless their value cannot readily be ascertained, or there is some special reason for the purchaser's obtaining them. See Ryan v. McLane, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. Rep. 438, in which specific performance was refused, and Hogg v. McGuffin, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491, in which it was granted. *See "Specific Performance," Dec. Dig. (Key-No.) § 68; Cent. Dig. § 199.*

tels, the value of which, either from their beauty, the interest attaching to them, or some other cause, cannot be represented by damages.[54]

Inability of Court to Supervise and Insure Performance

A court of equity will not decree specific performance where the matter of the contract is such that it cannot supervise or insure its execution.[55] This rule is illustrated by the refusal of courts of equity to decree specific performance of contracts involving personal services.[56] An injunction may be used to enforce a promise or covenant to forbear. It has been held that where an executory contract contains both positive and negative promises, and the court is unable to enforce the former, it may nevertheless enforce the latter by an injunction. Thus where a professional singer was sued by the proprietor of a theater for specific performance of a contract to sing at his theater upon certain terms, and during a certain period to sing nowhere else, the court refused to enforce so much of the contract as related to the promise to sing, but enforced the promise not to sing elsewhere by granting an injunction.[57]

Specific Performance Discretionary

The enforcement of specific performance is discretionary with the court, and the court must be satisfied not only that there was a valid

[54] De Mattos v. Gibson, 4 De Gex & J. 276; Buxton v. Lester, 3 Atk. 384; Hapgood v. Rosenstock (C. C.) 23 Fed. 86; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; Hull v. Pitrat (C. C.) 43 Fed. 94; Eaton, Eq. 527. *See "Specific Performance," Dec. Dig. (Key-No.) § 69; Cent. Dig. §§ 200–202.*

[55] Wilson v. Railway Co., L. R. 9 Ch. App. 279; Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630. *See "Specific Performance," Dec. Dig. (Key-No.) §§ 73–75; Cent. Dig. §§ 206–210.*

[56] Lumley v. Wagner, 1 De Gex, M. & G. 616; Webb v. England, 29 Beav. 44; Clark's Case, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; WM. ROGERS MFG. CO. v. ROGERS, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278, Throckmorton Cas. Contracts, 415. *See "Specific Performance," Dec. Dig. (Key-No.) § 73; Cent. Dig. §§ 206–208.*

[57] Lumley v. Wagner, 1 De Gex, M. & G. 616. And see McCaull v. Braham (C. C.) 16 Fed. 37; Duff v. Russell, 133 N. Y. 678, 31 N. E. 622; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Port Clinton R. Co. v. Railroad Co., 13 Ohio St. 544; Daly v. Smith, 38 N. Y. Super. Ct. 158; Id., 49 How. Prac. (N. Y.) 150; Richardson v. Peacock, 26 N. J. Eq. 40. Cf. Davis v. Foreman [1894] 3 Ch. 654; Rice v. D'Arville, 162 Mass. 539, 39 N. E. 180; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98. In this country, however, an injunction will be granted only where the services contracted to be performed are peculiar, unique, or extraordinary. WM. ROGERS MFG. CO. v. ROGERS, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278, Throckmorton Cas. Contracts, 415; H. W. Gossard Co. v. Crosby, 132 Iowa, 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115, and note. *See "Specific Performance," Dec. Dig. (Key-No.) § 73; Cent. Dig. §§ 206–208.*

contract, but that its enforcement would be equitable and just.[58] "It must appear that the enforcement will work no hardship and injustice, for, if that result would follow, the court will leave the parties to their remedy at law, unless the granting of the specific relief can be accomplished with conditions which will obviate that result." [59]

SAME—DISCHARGE OF RIGHT OF ACTION

265. The right of action arising from a breach of contract can only be discharged in one of three ways:

(a) By the consent of the parties.

(b) By the judgment of a court of competent jurisdiction.

(c) By lapse of time.

SAME—DISCHARGE BY THE CONSENT OF THE PARTIES

266. Discharge by the consent of the parties may take place either—

(a) By release, which is a gratuitous waiver of the right of action, and must therefore be under seal.

(b) By accord and satisfaction, which is an agreement to discharge the right of action based on a consideration which is executed.[60]

Release

At common law, a release was a gratuitous waiver by a person of a right of action accruing to him from a breach of contract or other obligation. No consideration was required, but it was necessary that the release should be under seal.[61] The effect of a

[58] Webster v. Cecil, 30 Beav. 62; Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Conger v. Railroad Co., 120 N. Y. 29, 23 N. E. 983; Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300; Combs v. Scott, 76 Wis. 662, 45 N. W. 532. Upon an anticipatory breach and suit brought before the time of performance, specific performance may be decreed, but only in the manner and at the time provided by the contract. Miller v. Jones, 68 W. Va. 526, 71 S. E. 248, 36 L. R. A. (N. S.) 408. *See "Specific Performance," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 17, 18.*

[59] Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501. *See "Specific Performance," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 17, 18.*

[60] Anson, Cont. (4th Ed.) 314.

[61] Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Shaw v. Pratt, 22 Pick. (Mass.) 308; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587; Ingersoll v. Martin, 58

seal as dispensing with a consideration has now been abolished in most jurisdictions in this country, and in these jurisdictions an agreement, even though under seal, may not operate to discharge a right of action unless it is supported by a consideration.[62] A release, being a species of contract, may be rendered invalid by any matter that would affect the validity of an ordinary contract, such as incapacity of parties, mistake, or fraud.[63]

Accord and Satisfaction

An accord and satisfaction is an agreement, which need not be under seal, the effect of which is to discharge the right of action possessed by one of the parties against the other. In order to have this effect, there must be a consideration for the promise of the party entitled to sue. It is further necessary that the accord shall be executed; otherwise the agreement is an accord without a satisfaction.[64] The promisor must have obtained what he bargained for in lieu of his right of action, and he must have obtained something more than a mere fresh arrangement as to the payment or discharge of the existing liability.[65] It is not meant by this that a promise can never be received as a satisfaction. If the promise and not its performance is accepted in satisfaction, it is a good accord and satisfaction without performance. In other

Md. 67, 42 Am. Rep. 322; Kidder v. Kidder, 33 Pa. 268. *See "Release," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 5–11.*

[62] 34 Cyc. 1045, 1046, 1048, et seq.

[63] See Pacific Mutual Ins. Co. v. Webb, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752. *See "Release," Dec. Dig. (Key-No.) §§ 16–20; Cent. Dig. §§ 31–38.*

[64] Bayley v. Homan, 3 Bing. (N. C.) 915; Lynn v. Bruce, 2 H. Bl. 317; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52; Costello v. Cady, 102 Mass. 140; Petty v. Allen, 134 Mass. 265; Flack v. Garland, 8 Md. 188; Simmons v. Clark, 56 Ill. 96; Pettis v. Ray, 12 R. I. 344; Hoxsie v. Lumber Co., 41 Minn. 548, 43 N. W. 476; Schlitz v. Meyer, 61 Wis. 418, 21 N. W. 243; Cobb v. Malone, 86 Ala. 571, 6 South. 6; Ogilvie v. Hallam, 58 Iowa, 714, 12 N. W. 730; Browning v. Crouse, 43 Mich. 489, 5 N. W. 664; Troutman v. Lucas, 63 Ga. 466; Frost v. Johnson, 8 Ohio, 393; Simmons v. Hamilton, 56 Cal. 493; Johnson's Adm'r v. Hunt, 81 Ky. 321; Hemingway v. Stansell, 106 U. S. 399, 1 Sup. Ct. 473, 27 L. Ed. 245; Yazoo & M. V. R. Co. v. Fulton, 71 Miss. 383, 14 South. 271; Welch v. Miller, 70 Vt. 108, 39 Atl. 749. In HARRISON v. HENDERSON, 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386, Throckmorton Cas. Contracts, 418, it is said, per Cunningham, J.: "An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement, as to what is right. A satisfaction, in its legal significance in this connection, is a performance of the terms of the accord." *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–13.*

[65] McManus v. Bank, L. R. 5 Exch. 65. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 40–45.*

words, a new contract agreed upon, and accepted, as a satisfaction, operates as an accord and satisfaction.[66] The satisfaction may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment;[67] or of new rights against the debtor and third persons, as in the case of a composition with creditors;[68] or of something different in kind from that which the debtor was bound by the original contract to perform;[69] but it must have been taken by the creditor as satisfaction for his claim in order to operate as a valid discharge. There can be no satisfaction without accord or agreement to that effect.[70]

As we have seen, a part payment of a liquidated debt does not constitute a discharge of the entire debt, even though it is accepted as such by the creditor, unless it is accompanied by a release under seal or by a new consideration.[71] Where, however, the debt is unliquidated or the amount is in dispute, a payment of a less amount than the sum claimed on condition that it be accepted in full discharge of the debt constitutes an accord and satisfaction.[72] In this case the act of the creditor in accepting payment constitutes evidence of his assent to the terms on which it is tendered.[73] But if the payment is to constitute a satisfaction

[66] Babcock v. Hawkins, 23 Vt. 561; Morehouse v. Bank, 98 N. Y. 503; Whitney v. Cook, 53 Miss. 531; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Heirn v. Carron, 11 Smedes & M. (Miss.) 361, 49 Am. Dec. 65; Christie v. Craige, 20 Pa. 430; Bradshaw v. Davis, 12 Tex. 336; Bennett v. Hill, 14 R. I. 322; Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; Sioux City Stock-Yards Co. v. Packing Co., 110 Iowa, 396, 81 N. W. 712. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 136–139.*

[67] Goddard v. O'Brien, 9 Q. B. Div. 37; Witherby v. Mann, 11 Johns. (N. Y.) 518; Guild v. Butler, 127 Mass. 386; Varney v. Conery, 77 Me. 527, 1 Atl. 683; Yates v. Valentine, 71 Ill. 643; Mason v. Campbell, 27 Minn. 54, 6 N. W. 405. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 40–45.*

[68] Ante, p. 165. [69] Ante, p. 163.

[70] Preston v. Grant, 34 Vt. 201; Boston Rubber Co. v. Wringer Co., 58 Vt. 551, 5 Atl. 407. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 16; Cent. Dig. §§ 116–122.*

[71] Ante, pp. 161–164.

[72] Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 67–74.*

[73] In England, the question as to whether there has been an accord and satisfaction is one of fact, and the mere circumstance that the creditor has kept money or a check tendered in full payment of an unliquidated demand does not raise a conclusive presumption that it has been accepted in full satisfaction. Day v. McLea, 22 Q. B. Div. 610. To the same effect, see Tompkins v. Hill, 145 Mass. 379, 14 N. E. 177. The American cases, however, generally hold, anomalously, that in such case an accord and satisfaction results, even though the creditor insists that the payment is accepted merely

it must appear that it was so understood by the creditor at the time it was received by him.[74] A simple tender of a balance as the amount in good faith believed by the debtor to be due "does not carry with it an implication or conclusion that by such tender the debtor paid, or that the creditor agreed to receive, the same in full of the amount due, where there had been no prior disagreement or discussion as to what was actually due."[75]

We have already fully considered the question of the sufficiency of the consideration.[76]

SAME—DISCHARGE BY JUDGMENT

267. The right of a party to sue for breach of contract is discharged by the final judgment of a court of competent jurisdiction either in his favor or against him. In the former case the cause of action merges in the judgment, while in the latter the judgment estops him.[77]

When the party entitled to sue for the breach of a contract made with him brings an action in a court of competent jurisdiction, and recovers a judgment, his right of action is thereby discharged. It merges in the judgment.[78] The result of legal pro-

on account. Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Laroe v. Dairy Co., 87 App. Div. 585, 84 N. Y. Supp. 609 (cf. Mack v. Miller, 87 App. Div. 359, 84 N. Y. Supp. 440); Anderson v. Granite Co., 92 Me. 429, 43 Atl. 21, 69 Am. St. Rep. 522; Rosema v. Porter, 112 Mich. 13, 70 N. W. 316; Lapp v. Smith, 183 Ill. 179, 55 N. E. 717; Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; Talbott v. English, 156 Ind. 299, 59 N. E. 857. And see Preston v. Grant, 34 Vt. 201. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 67–74.*

[74] HARRISON v. HENDERSON, 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386, Throckmorton Cas. Contracts, 418; Canadian Fish Co. v. McShane, 80 Neb. 551, 114 N. W. 594, 14 L. R. A. (N. S.) 443, 127 Am. St. Rep. 791; Kingsville Preserving Co. v. Frank, 87 Ill. App. 586. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 67–74.*

[75] HARRISON v. HENDERSON, 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386, Throckmorton Cas. Contracts, 418; ante, p. 164. *See "Accord and Satisfaction," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 67–74.*

[76] Ante, pp. 161–164.

[77] Anson, Cont. (4th Ed.) 315, 316.

[78] Mason v. Eldred, 6 Wall. 231, 18 L. Ed. 783; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Miller v. Covert, 1 Wend. (N. Y.) 487; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Turner v. Plowden, 5 Gill & J. (Md.) 52, 23 Am. Dec. 396; Oliver v. Holt, 11 Ala. 574, 46 Am. Dec. 228; Boynton v. Ball, 105 Ill. 627; Pike v. McDonald, 32 Me. 418, 54 Am.

ceedings taken upon a broken contract may be thus summarized: The bringing of an action has not of itself any effect in discharging the right of action. Another action may be brought for the same cause in another court, and, though proceedings in such an action would be stayed, if they are merely vexatious, yet if action for the same cause is brought in a home court and in a foreign court, the fact that the defendant is being sued in the latter would not in any way affect his position in the former.[79] When the action is pursued to judgment, a judgment adverse to the plaintiff discharges the obligation by estoppel. The plaintiff cannot bring another action for the same cause so long as the judgment stands.[80] The matter is res judicata. The judgment may be reversed by a higher court, or a new trial granted, and the parties may be remitted to their original positions.[81]

An adverse judgment, in order to discharge the obligation by estopping the plaintiff from reasserting his claim, must have proceeded upon the merits of the case and must be final. Where the litigation has ended in a discontinuance or a nonsuit, or on demurrer for defect in pleading, so that an actual decision on the merits has not been reached, or the finding of a judge or referee has not passed into a judgment, and so become absolutely fixed and final, the proceedings have no conclusive character, and cannot operate as a bar.[82] So, if a plaintiff fails in his action because

Dec. 597; Barnes v. Gibbs, 31 N. J. Law, 317, 86 Am. Dec. 210. *See "Judgment." Dec. Dig. (Key-No.) §§ 582–584; Cent. Dig. §§ 1079–1089.*

[79] Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782; Wood v. Gamble, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; O'Reilly v. Railroad Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 3 L. R. A. 364, 6 L. R. A. 719; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Davis v. Morton, 4 Bush (Ky.) 442, 96 Am. Dec. 309. This does not apply to actions in rem. *See "Abatement and Revival," Dec. Dig. (Key-No.) § 10; Cent. Dig. §§ 86–104.*

[80] Patrick v. Shaffer, 94 N. Y. 423; Norton v. Doherty, 8 Gray (Mass.) 372, 63 Am. Dec. 758; Winslow v. Stokes, 48 N. C. 285, 67 Am. Dec. 242; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Nispel v. Laparle, 74 Ill. 306. *See "Judgment," Dec. Dig. (Key-No.) §§ 582–584; Cent. Dig. §§ 1063–1089.*

[81] Clark v. Bowen, 22 How. 270, 16 L. Ed. 337; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. 111. *See "Judgment," Dec. Dig. (Key-No.) § 580; Cent. Dig. § 1024.*

[82] Webb v. Buckelew, 82 N. Y. 555; Audubon v. Insurance Co., 27 N. Y. 216; Leonard v. Barker, 5 Denio (N. Y.) 220; Atkins v. Anderson, 63 Iowa, 739, 19 N. W. 323; Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119; Gould v. Railroad Co., 91 U. S. 526, 23 L. Ed. 416; Linington v. Strong, 111 Ill. 152; Gage v. Ewing, 114 Ill. 15, 28 N. E. 379; Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250); Haws v. Tiernan, 53 Pa. 192; Gallup v. Lichter, 4 Colo. App.

he has sued in a wrong character, or because he sued at a wrong time, as in case of an action brought before fulfillment of a condition in the contract, such as the expiration of a period of credit on the sale of goods,—a judgment proceeding on these grounds will not prevent him from succeeding in a second action.[83] It is also necessary that the judgment shall have been rendered by a court of competent jurisdiction and shall be otherwise valid.[84] As has been said, if the plaintiff succeeds, and obtains judgment in his favor, the right of action merges in the judgment, and is discharged. A new obligation arises in the judgment, a form of the so-called "contract of record—a quasi contractual obligation." The obligation arising from the judgment may be discharged by payment of the judgment debt, or by satisfaction obtained by the creditor from the property of the debtor by the process of execution, or an action quasi ex contractu may be brought upon it.

SAME—LAPSE OF TIME

268. Lapse of time may affect the remedy of the parties to a contract, but, in the absence of statutory provision, it cannot affect their rights.

269. In all the states there are statutes of limitation barring actions on contracts unless they are brought within a prescribed time.

Laches may bar the right to relief in equity,[85] and at law a creditor's delay in asserting his claim may raise a rebuttable pre-

296, 35 Pac. 985; Baugh v. Baugh, 4 Bibb (Ky.) 536; Pierce v. Hilton, 102 Cal. 276, 36 Pac. 593; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571. *See "Judgment," Dec. Dig. (Key-No.) § 570; Cent. Dig. §§ 1028–1045.*

[83] Bull v. Hopkins, 7 Johns. (N. Y.) 22; McFarlane v. Cushman, 21 Wis. 406; Brackett v. People, 115 Ill. 29, 3 N. E. 723; Rodgers v. Levy, 36 Neb. 601, 54 N. W. 1080; Baxter v. Aubrey, 41 Mich. 13, 1 N. W. 897; Wood v. Faut, 55 Mich. 185, 20 N. W. 897. *See "Judgment," Dec. Dig. (Key-No.) § 570; Cent. Dig. §§ 1028–1045.*

[84] Hickey v. Stewart, 3 How. 750, 11 L. Ed. 814; Stowell v. Chamberlain, 60 N. Y. 272; Reading v. Price, 3 J. J. Marsh. (Ky.) 62, 19 Am. Dec. 162; Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Richardson v. Aiken, 84 Ill. 221; Oleson v. Merrihew, 45 Wis. 397. *See "Judgment," Dec. Dig. (Key-No.) §§ 542–548; Cent. Dig. §§ 987–993.*

[85] Eads v. Williams, 4 De Gex, M. & G. 674; Southcombe v. Bishop, 6 Hare, 213; Seculovich v. Morton, 101 Cal. 673, 36 Pac. 337, 40 Am. St. Rep. 106; Rogers v. Van Nortwick, 87 Wis. 414, 58 N. W. 757; Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910; Cocanougher v. Green, 93 Ky. 519, 20 S. W. 542; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Patter-

sumption that the debt is paid;[86] but, aside from this, lapse of time, in the absence of statutory provision, does not affect the rights of the parties to a contract. The rights arising from a contract are of a permanent and indestructible character, unless either from the nature of the contract or from its terms it is limited in point of duration.[87]

In all states, however, there are "statutes of limitations," which provide that actions on contracts must be brought within a certain number of years, or be barred. The time limited varies in the different states. In some states no distinction with respect to the time limited is made between the different kinds of contracts, while in others such a distinction is made. These statutes vary in other respects, and only brief mention of some of their more general provisions can be made.

Disabilities and Exceptions

Though, as a rule, the statute begins to run as soon as the cause of action accrues, and continues to run until the bar is complete, there are certain circumstances which suspend its operation. It is generally provided that infancy, coverture, insanity, or imprisonment shall, where the person entitled to sue is affected by any of these disabilities when the cause of action accrues, suspend the operation of the statute until the disability is removed. A disability arising after the period of limitation has commenced to run will not affect the operation of the statute.

As a rule, ignorance that a right of action exists will not suspend the operation of the statute. Where, however, that ignorance was produced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the discovery of the fraud.

Acknowledgment and New Promise

Ordinarily the statute of limitations is held merely to bar the remedy, but not to extinguish the right, and therefore the right

son v. Martz, 8 Watts (Pa.) 374, 34 Am. Dec. 474. *See "Equity," Dec. Dig. (Key-No.) § 67; Cent. Dig. §§ 191–196.*

[86] Williams v. Mitchell, 112 Mo. 300, 20 S. W. 647; Knight v. McKinney, 84 Me. 107, 24 Atl. 744; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Atkinson v. Dance, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; Stover v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634; Walker v. Emerson, 20 Tex. 706, 73 Am. Dec. 207. *See "Payment," Dec. Dig. (Key-No.) § 66; Cent. Dig. §§ 176–188.*

[87] Anson, Cont. (4th Ed.) 316; Llanelly Ry. & Dock Co. v. Railway Co., L. R. 7 H. L. 550, 567. *See "Payment," Dec. Dig. (Key-No.) § 66; Cent. Dig. §§ 176–188.*

of action, after it has become barred, may be revived.[88] Where a simple contract, for instance, has resulted in a money debt, the right of action may be revived by subsequent acknowledgment or promise. In some jurisdictions there are statutory provisions requiring that the acknowledgment or promise, to be effectual, must be in writing, signed by the party to be charged or his duly-authorized agent. The sort of acknowledgment or promise which has been held to be requisite in order that a simple contract debt may be revived so as to start the running of the statute anew has been thus described: "There must be one of these three things to take the case out of the statute: Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." [89]

Same—Part Payment

A debt barred by the statute may also be revived by a part payment. A payment on account of the principal, or a payment of interest on the debt, will take the contract out of the statute. It is provided by most, if not all, of the statutes requiring a new promise or acknowledgment to be in writing, and signed by the promisor or his agent, that nothing therein contained shall take away or lessen the effect of such part payments. The payment, to have the effect of reviving the debt, must be made with reference to the original debt, and in such a manner as to amount to an acknowledgment of it.[90] Where a payment is made by a debtor

[88] Campell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483. Contra, Pierce v. Seymour, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737. *See "Limitation of Actions," Dec. Dig. (Key-No.) § 139; Cent. Dig. §§ 574, 593, 621.*

[89] In re River Steamer Co., 6 Ch. App. 822, 828. Some courts have held that a mere acknowledgment of the debt as existing is sufficient to remove the bar, even though there be an express declaration of intention not to pay it; but most courts hold that this is not enough (regarding the statute as one of repose rather than one of presumption), but that the acknowledgment must be of such a nature as to show that the debtor intended to promise to pay. WARREN v. CLEVELAND, 111 Tenn. 174, 76 S. W. 910, 102 Am. St. Rep. 749, Throckmorton Cas. Contracts, 422. Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614; Heany v. Schwartz, 155 Pa. 154, 25 Atl. 1078; Perry v. Chesley, 77 Me. 393; Hussey v. Kirkman, 95 N. C. 63. As to conditional promises, see Boynton v. Moulton, 159 Mass. 248, 34 N. E. 361. *See "Limitation of Actions," Dec. Dig. (Key-No.) § 145; Cent. Dig. §§ 584–592.*

[90] Waters v. Tompkins, 2 Cromp., M. & R. 722; Miner v. Lorman, 56 Mich. 212, 22 N. W. 265; State v. Corlies, 47 N. J. Law, 108; Sears v. Hicklin, 3 Colo. App. 331, 33 Pac. 137; Benton v. Holland, 58 Vt. 533, 3 Atl. 322; Blas-

to his creditor without indicating upon which of several debts it is to be applied, and it is applied by the creditor to a debt not barred by the statute of limitations, such application will prolong the running of the statute as to the remainder of the debt for the full period from the time it is made. But if, in the absence of application by the debtor, it is applied by the creditor to a debt barred by the statute, such application does not remove the statutory bar as to the balance of the debt; "to have that effect, the appropriation must be made by the debtor himself." [91]

kower v. Steel, 23 Or. 106, 31 Pac. 253. *See "Limitation of Actions," Dec. Dig. (Key-No.) § 157; Cent. Dig. §§ 631–636.*

[91] Blake v. Sawyer, 83 Me. 120, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762. *See "Limitation of Actions," Dec. Dig. (Key-No.) § 155; Cent. Dig. §§ 623–630.*

CHAPTER XII

QUASI CONTRACT

270. In General.
271. Money Paid for the Use of Another.
272. Money Received for the Use of Another.
273. Recovery for Benefits Conferred.

IN GENERAL

270. Ordinarily, a person can only maintain an action ex contractu against another by proving a contract in fact. There are circumstances, however, under which the law will create a fictitious promise for the purpose of allowing the remedy by action of assumpsit. The obligation is not a contract, but a quasi contract. It may be founded—

(a) Upon the judgment of a court.
(b) Upon a statutory, official, or customary duty.
(c) Upon the principle that no one ought unjustly to enrich himself at the expense of another.

As we have seen in treating of the nature of contract, every true contract involves, not only obligation, but agreement. If there is no agreement, there can be no true contract. There may be an obligation, but, unless this obligation is imposed by the free consent of the parties, the obligation is not a contractual obligation.

There are, however, as has been stated, certain obligations which arise neither from tort nor from contract, but which are imposed or created by law without the assent of the party bound, and which are allowed to be enforced by an action ex contractu. These obligations are not contract obligations, for there is no agreement, but they are clothed with the semblance of contract for the purpose of remedy. They are described by the term quasi contracts.[1]

[1] Anson, Cont. (8th Ed.) 361 et seq.; Keener, Quasi Cont. c. 1; Dusenbury v. Speir, 77 N. Y. 150. See, also, Lawson's Ex'rs v. Lawson, 16 Grat. (Va.) 230, 80 Am. Dec. 702; Sceva v. True, 53 N. H. 627; Montgomery v. Waterworks Co., 77 Ala. 248; Schaeffer v. Miller, 41 Mont. 417, 109 Pac. 970, 137 Am. St. Rep. 746. The term "constructive contract" is also used to describe such obligations created by law. HERTZOG v. HERTZOG, 29 Pa. 465, Throckmorton Cas. Contracts, 5. *See "Contracts," Dec. Dig. (Key-No.) §§ 5, 27; Cent. Dig. §§ 7, 121–132.*

For example, obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done or forborne by one party in respect to another. It may arise from entry of judgment by consent of the parties, in which case the element of agreement is present; but, on the other hand, it may arise against the will of the party bound thereby, in which case there is no element of agreement, and therefore no true contract. Such an obligation is quasi contractual.[2] As we have seen, however, in the classification of contracts, it is usual to divide contracts into simple contracts, contracts under seal, and "contracts of record," under which are included judgments.[3]

Again, if A. has paid something which B. ought to pay, or if B. has received something which A. ought to receive, the law imposes on B. the duty to make good to A. the advantage to which A. is entitled. Or if A. has obtained money from B. through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law imposes a duty on the wrongdoer to restore it to the rightful owner, although this was the very opposite of his intention.[4]

It is obvious that the duty of B. in such cases is not contractual. Nevertheless, in the classification of contracts, it has been usual to divide simple contracts into (1) express contracts; (2) contracts implied in fact; and (3) contracts implied in law. Under this classification the term "contracts implied in fact" is applied to contracts in which the agreement of the parties is evidenced by their conduct, and which are true contracts, in distinction to contracts in which the agreement is evidenced by words and which are said to be express; and the term "contract implied in law" is applied to obligations created by law,[5] or quasi contracts. "This treatment of quasi contract," says Professor Keener, "is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and

[2] Keener, Quasi Cont. 16; State of Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; O'BRIEN v. YOUNG, 95 N. Y. 428, 47 Am. Rep. 64, Throckmorton Cas. Contracts, 36; Rae v. Hulbert, 17 Ill. 572; Morse v. Tappan, 3 Gray (Mass.) 411; Gutta-Percha & R. Mfg. Co. v. City of Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412; Morley v. Lake Shore & M. S. Ry., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; ante, p. 8. *See "Contracts," Dec. Dig. (Key-No.) §§ 1–5; Cent. Dig. §§ 1–7.*

[3] Ante, p. 58.

[4] See Dusenbury v. Speir, 77 N. Y. 150. *See "Contracts," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 7.*

[5] Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846. *See "Contracts," Dec. Dig. (Key-No.) § 5; Cent. Dig. § 7.*

therefore vicious in practice. It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent." [6]

The explanation of this anomalous classification, which includes obligations created by law among contracts, is to be found in the law of remedies.[7] The only forms of action at common law were actions of tort and actions of contract. Obligations created by law resemble true contracts, in that "the duty of the obligor is a positive one; that is, to act. In this respect they both differ from obligations the breach of which constitutes a tort, where the duty is negative; that is, to forbear." [8] This and other considerations suggested the analogy of contract, rather than of tort, and made it natural, when seeking to adapt the remedy to the right, to treat obligations created by law as contracts rather than torts. An action of debt was the remedy for breach of contract based on executed consideration, where such breach resulted in a liquidated or ascertained money claim, and also where a statute or the common law or custom laid a duty upon one to pay an ascertained sum to another. Assumpsit was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee.[9] Owing to certain inconveniences attaching to the action of debt, assumpsit was preferred to debt as a form of action, and by degrees the scope of the action was enlarged, until the action of assumpsit came to be used instead of debt, where the contract resulted in a liquidated claim, and a money debt was stated in the form of an assumpsit or undertaking to pay it. Thus it came about that an action might be maintained in assumpsit on a liquidated claim or debt; and when the breach of a contract resulted in such a claim, the plaintiff was allowed to declare in the form of a short statement of the debt, based upon a request by the defendant, as for goods sold, money lent, work and labor supplied, etc.[10] This enabled claims arising from contract to be variously stated in the same suit "as a special agree-

[6] Keener, Quasi Cont. 3.

[7] See Keener, Quasi Cont. c. 1; Anson, Cont. (8th Ed.) 360–364; The History of Assumpsit, by Prof. J. B. Ames, 2 Harv. Law Rev. 1–19, 53–69, III Select Essays in Anglo-American Legal History, 259.

[8] 2 Harv. Law Rev. 63, III Select Essays in Anglo-American Legal History, 292.

[9] Anson, Cont. (8th Ed.) 361.

[10] Id. 362; Slade's Case, 4 Co. Rep. 92. *See "Assumpsit, Action of," Dec. Dig. (Key-No.) § 7; Cent. Dig. §§ 37–41.*

ment which had been broken, and as a debt resulting from an agreement, and hence imparting a promise to pay. Such a mode of pleading was called an indebitatus count, or count indebitatus assumpsit." [11] The promise in such cases, resulting from the terms of the agreement, although only by an innovation in the form of remedy made the basis of an assumpsit, was actual, and not a mere fiction.[12] The form of action thus evolved, however, came to be applied to those kinds of legal liability which had previously given rise to an action of debt, though void of the element of agreement. In these cases the form of remedy could be adapted to the right only by means of a fiction, for to support assumpsit it was necessary to allege a promise, and consequently, to meet the difficulty, the courts adopted the fiction of a promise, and it was declared that a promise was "implied in law." [13] It was in this way that these obligations became clothed with the semblance of, and came to be classed as, contracts. "For the convenience of the remedy," they "have been made to figure as though they sprung from contract, and have appropriated the form of agreement." [14]

Quasi contracts fall under three classes: [15] (1) Obligations founded upon a record, as a judgment; [16] (2) obligations founded upon a statutory,[17] or official, or customary duty; [18] and (3) obligations founded "upon the fundamental principle that no one ought unjustly to enrich himself at the expense of another," [19]

[11] Anson, Cont. (8th Ed.) 362.

[12] See 2 Harv. Law Rev. 56, III Select Essays in Anglo-American Legal History, 285.

[13] Keener, Quasi Cont. 4–5.

[14] Anson, Cont. (8th Ed.) 362.

[15] 2 Harv. Law Rev. 64, III Select Essays in Anglo-American Legal History, 293; Keener, Quasi Cont. c. 1; Woodward, Quasi Cont. 1.

[16] Ante, p. 60.

[17] Keener, Quasi Cont. 16; State of Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; O'BRIEN v. YOUNG, 95 N. Y. 428, 47 Am. Rep. 64, Throckmorton Cas. Contracts, 36; Rae v. Hulbert, 17 Ill. 572; Morse v. Tappan, 3 Gray (Mass.) 411; Gutta-Percha & R. Manuf'g Co. v. City of Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805. Illustrations of such an obligation arise where a statute imposes a duty upon one county or parish to pay another for money expended in the support of a pauper; or under any other circumstances declares that one person may recover from another money paid out by him for the benefit of the latter; or where a statute allows an action to recover usury paid, or money lost and paid on a wager. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

[18] See Keener, Quasi Cont. 17, 18.

[19] 2 Harv. Law Rev. 64, III Select Essays in Anglo-American Legal History, 293; Bloomington Tp. Bd. of Highway Com'rs v. City of Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471. *See "Contracts," Dec. Dig. (Key-No.) §§ 5, 27; Cent. Dig. §§ 7, 121–132.*

as the obligation to repay money paid under a mistake or under duress or compulsion, the obligation of an infant to pay for necessaries, the obligation to pay for benefits conferred under a contract unenforceable because within the statute of frauds which the party who has received the benefit refuses to carry out, the obligation to pay for benefits conferred under a contract where full performance is prevented.

Within the third class are embraced the most important cases of quasi contractual obligation, and the brief discussion which follows will be confined to cases within that class.

MONEY PAID FOR THE USE OF ANOTHER

271. Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the payment, and a promise to repay—and the obligation thus created may be enforced by assumpsit.

It is a rule of law that no man "can make himself the creditor of another by paying that other's debt against his will or without his consent,"[20] or at least without some act on his part which will prevent him from withholding consent. Assumpsit will not lie, therefore, for money officiously paid by the plaintiff for the defendant's use. The defendant must have requested such payment, or he must, by his conduct, have made it necessary for the plaintiff to pay. Where a person expressly requests another to pay money for him under such circumstances as to import a promise to repay, and the money is paid in accordance with the request, the transaction involves an actual agreement. Where no request in fact exists, and there is no agreement in fact respecting the payment, the law may imply a fictitious request. As a rule, wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the pay-

[20] Johnson v. Packet Co., L. R. 3 C. P. 43; Durnford v. Messiter, 5 Maule & S. 446; Hearn v. Cullen, 54 Md. 533; Turner v. Egerton, 1 Gill & J. (Md.) 430, 19 Am. Dec. 235. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1-16.*

ment, and a promise to repay. It will not do to say that there was no agreement in fact, for the law creates the promise.[21]

A good illustration of such an obligation is where one of several sureties, or other joint debtors, pays the whole debt. In such a case he is allowed to recover from each of the others his proportionate share. A request to pay and a promise to repay are feigned in order to entitle him to the remedy of assumpsit.[22] So, where an executor was compelled to pay a legacy duty for which the legatee was ultimately liable, he was allowed to recover the amount from the legatee as money paid for his use.[23]

[21] Anson, Cont. (8th Ed.) 363; Great Northern Ry. Co. v. Swaffield, L. R. 9 Exch. 132; Exall v. Partridge, 8 Term R. 308; Sapsford v. Fletcher, 4 Term R. 511; Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677; Grissell v. Robinson, 3 Bing. N. C. 10; Wells v. Porter, 7 Wend. (N. Y.) 119; Houser v. McGinnas, 108 N. C. 631, 13 S. E. 139; Hawley v. Beverley, 6 Man. & G. 221; Johnson v. Packet Co., L. R. 3 C. P. 38; Hales v. Freeman, 1 Brod. & B. 391; Hutzler v. Lord, 64 Md. 534, 3 Atl. 891; Turner v. Egerton, 1 Gill & J. (Md.) 430, 19 Am. Dec. 235; City of Baltimore v. Hughes, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243; Iron City Tool-Works v. Long (Pa.) 7 Atl. 82; Beard v. Horton, 86 Ala. 202, 5 South. 207; Perin v. Parker, 25 Ill. App. 465. *See "Money Paid," Dec. Dig. (Key-No.) § 2; Cent. Dig. § 17; "Contracts," Cent. Dig. § 121.*

[22] Kemp v. Fender, 12 Mees. & W. 421; Holmes v. Williamson, 6 Maule & S. 158; Davies v. Humphreys, 6 Mees. & W. 153; Deering v. Winchelsea, 2 Bos. & P. 270; Norton v. Coons, 6 N. Y. 33; Doremus v. Selden, 19 Johns. (N. Y.) 213; Tobias v. Rogers, 13 N. Y. 59; Johnson v. Harvey, 84 N. Y. 363, 38 Am. Rep. 515; Aldrich v. Aldrich, 56 Vt. 324, 48 Am. Rep. 791; Jackson v. Murray, 77 Tex. 644, 14 S. W. 235; Nickerson v. Wheeler, 118 Mass. 295; Wilton v. Tazwell, 86 Ill. 29; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547; Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497; Foster v. Burton, 62 Vt. 239, 20 Atl. 326; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; Bushnell v. Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411. In some jurisdictions, contribution between cosureties must be enforced in equity. Longley v. Griggs, 10 Pick. (Mass.) 121; McDonald v. Magruder, 8 Pet. 470, 7 L. Ed. 744. And, where a surety has been compelled to pay the debt, he may, on the same principle, where there is no express contract with the principal (Touissaint v. Martinnant, 2 Term R. 100), recover the amount from his principal, as for money paid to his use. Alexander v. Vane, 1 Mees. & W. 511; Pownal v. Ferrand, 6 Barn. & C. 439; Crisfield v. State, 55 Md. 192. As a rule, no right of contribution exists between joint wrongdoers. Merryweather v. Nixan, 8 Term R. 186; Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723. But the rule does not apply where one of them is innocent of any intentional or actual wrong, and has been compelled to pay damages which the other, who was the actual wrongdoer, should have paid. In such a case, on equitable principles, contribution may be enforced. Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Farwell v. Becker, 129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267; Village of Port Jervis v. Bank, 96 N. Y. 550; Bailey v. Bussing, 28 Conn. 455. *See "Principal and Surety," Dec. Dig. (Key-No.) § 194; Cent. Dig. §§ 605–623.*

[23] Foster v. Ley, 2 Bing. N. C. 269; Bate v. Payne, 13 Q. B. 900; Hales v.

Another class of cases falling under this head are cases in which a person is compelled by the wrong or fraud of another to pay money to a third person. He may recover the amount from the person so guilty of the wrong or fraud.[24] Where, for instance, a member of a firm gives a promissory note, signed in the partnership name, for a debt of his own, and his partner is compelled to pay it, the latter may recover from the former as for money paid to his use;[25] and where a carrier, by mistake, delivers goods to the wrong person, and he wrongfully detains them, so that the carrier is compelled to pay their value, he is liable to the carrier for the amount so paid.[26]

It must be remembered, as already stated, that it is not every payment on another's account that will make the latter liable. No implied promise to repay is raised where a person makes a payment voluntarily, and without any legal liability or compulsion, in discharge of the debt or liability of another;[27] nor where he has been compelled to make the payment by his own wrongful act;[28] nor where the payment is made in discharge of a liability which is a mere moral liability, and is not recognized in law;[29] nor where a payment is made in discharge of another's liability by express agreement with the latter.[30] It has further been held that, to entitle a person to recover from another money paid for

Freeman, 1 Brod. & B. 391. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[24] Bleaden v. Charles, 7 Bing. 246; Smith v. Cuff, 6 Maule & S. 160; Horton v. Riely, 11 Mees. & W. 492; Van Santen v. Oil Co., 81 N. Y. 171. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[25] Cross v. Cheshire, 7 Exch. 43. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[26] Brown v. Hodgson, 4 Taunt. 188. And see Long Champs v. Kenny, 1 Doug. 137. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[27] Bates v. Townley, 2 Exch. 152; Sleigh v. Sleigh, 5 Exch. 514. Payment of money by a person to procure the release of his property from seizure for another's debt does not impose any liability on the latter if the seizure was unlawful, or, rather, unless it is shown that it was lawful. Myers v. Smith, 27 Md. 91. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[28] Pitcher v. Bailey, 8 East, 171. Where an officer, for instance, having custody of a prisoner for debt, suffered him to go at large, and, in consequence, was compelled to pay the creditor himself, it was held that he could not recover the amount from the debtor. Pitcher v. Bailey, supra. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[29] Atkins v. Banwell, 2 East, 505. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[30] Action must be brought on the express agreement. Spencer v. Parry, 3 Adol. & E. 331; Lubbock v. Tribe, 3 Mees. & W. 607. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

the latter's use, there must be some privity between them. Legal liability incurred by one person on behalf of another, without any concurrence or privity on the part of the latter, will not entitle him to recover for money which, under such circumstances, he may pay to the latter's use. The liability must have been in some way cast upon him by the latter. The mere fact that he has paid, under compulsion of law, what the latter might have been compelled to pay, will give him no right of action against the latter. In an English case, the plaintiff, being entitled under a bill of sale to seize the defendant's goods, did so, but left the goods on the defendant's premises until rent fell due to the defendant's landlord. The landlord distrained the goods, whereupon the plaintiff paid the rent, and sued the defendant for the amount, as having been paid to his use. It was held that the facts gave the plaintiff no right of action. "Having seized the goods under the bill of sale," it was said, "they were his absolute property. He had a right to take them away; indeed, it was his duty to take them away. He probably left them on the premises for his own purposes. * * * At all events, they were not left there at the request, or for the benefit, of the defendant." [21]

In all cases, to entitle the plaintiff to recover there must have been a payment, not necessarily of money, but of property at least, accepted as payment and in extinguishment of the claim. The giving of a bond or note, for instance, is not sufficient, for "the mere extinguishment of the original liability by way of new security will not avail." [22] It is otherwise, however, if land or other property is transferred absolutely as payment, and in extinguishment of the claim.[23]

MONEY RECEIVED FOR THE USE OF ANOTHER

272. Wherever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay it to the latter, and the obligation may be enforced by assumpsit.

[21] England v. Marsden, L. R. 1 C. P. 529. And see Bay City Bank v. Lindsay, 94 Mich. 176, 54 N. W. 42. But see Edmunds v. Wallingford, 14 Q. B. Div. 811; Keener, Quasi Cont. 390. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[22] Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Taylor v. Higgins, 3 East, 170; Cumming v. Hackley, 8 Johns. (N. Y.) 202. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

[23] Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Randall v. Rich, 11 Mass. 494. *See "Money Paid," Dec. Dig. (Key-No.) § 1; Cent. Dig. §§ 1–16.*

Contracts arising from agreement frequently result in the receipt and holding of money by one of the parties for the use of the other; as, where a person is employed by another as agent to receive money, and to account for and pay over the amount received, and receives money by virtue of his employment. In such a case his obligation results from agreement. In some cases a similar obligation is created by law. The receipt by one person of money to which another person is entitled, under some circumstances, creates a debt without agreement, and even against dissent. The law creates the debt and a promise to pay it. The debt is technically described as a debt "for money received by the defendant for the use of the plaintiff," or "for money had and received." It has been said that such an action will lie whenever the defendant has money to which, in equity and good conscience, the plaintiff is entitled;[84] that the action is equitable in its nature, and will lie, generally, wherever a bill in equity would lie.[85]

The obligation thus created from the receipt of money can arise only in respect of money or what is equivalent to money.[86] Goods received by the defendant, for instance, cannot be treated as money, so as to support such an action, so long as they are undisposed of and remain in the defendant's hands;[87] but it is otherwise where

[84] Lawson's Ex'rs v. Lawson, 16 Grat. (Va.) 230, 80 Am. Dec. 702; Barnett v. Warren, 82 Ala. 557, 2 South. 457; Merchants' Bank v. Rawls, 7 Ga. 191, 50 Am. Dec. 394; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299; O'Fallon v. Boismenu, 3 Mo. 405, 26 Am. Dec. 678; Boyett v. Potter, 80 Ala. 476, 2 South. 534; Vrooman v. McKaig, 4 Md. 450, 59 Am. Dec. 85; Teegarden v. Lewis (Ind.) 35 N. E. 24; O'Conley v. City of Natchez, 1 Smedes & M. (Miss.) 31, 40 Am. Dec. 87; Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575. Money paid on judgment before or pending appeal may be recovered after the judgment is reversed. Chapman v. Sutton, 68 Wis. 657, 32 N. W. 683; Clark v. Pinney, 6 Cow. (N. Y.) 297; Kalmbach v. Foote, 79 Mich. 236, 44 N. W. 603; Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589; Scholey v. Halsey, 72 N. Y. 578. See, also, Isom v. Johns, 2 Munf. (Va.) 272; Schaeffer v. Miller, 41 Mont. 417, 109 Pac. 970, 137 Am. St. Rep. 746. *See "Money Received," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 1.*

[85] Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 375; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Kennedy v. Insurance Co., 3 Har. & J. (Md.) 367, 6 Am. Dec. 499. *See "Money Received," Dec. Dig. (Key-No.) § 1; Cent. Dig. § 1.*

[86] Leake, Cont. 67; Keener, Quasi Cont. 139, 170; Foster v. Dupre, 5 Mart. (O. S. La.) 6, 12 Am. Dec. 466; Brundage v. Village of Port Chester, 102 N. Y. 494, 7 N. E. 393; Lee v. Merrit, 8 Q. B. 820; Nightingale v. Devisme, 5 Burrows, 2589; Scott v. Miller, 3 Bing. N. C. 811; Atkins v. Owen, 4 Adol. & E. 819; Balch v. Patten, 45 Me. 41, 71 Am. Dec. 526; Libby v. Robinson, 79 Me. 168, 9 Atl. 24. *See "Money Received," Dec. Dig. (Key-No.) § 2; Cent. Dig. §§ 2–5.*

[87] Thurston v. Mills, 16 East, 254; Hendricks v. Goodrich, 15 Wis. 679; Moses v. Arnold, 43 Iowa, 187, 22 Am. Rep. 239; Stearns v. Dillingham, 22

they have been sold and converted into money by him.[38] In such a case the right to recover is based on the receipt by the defendant of money belonging to the plaintiff, and the amount of money received, and not the value of the goods, is the measure of recovery. It follows from this that if the money, or an equivalent, is not received for the goods, even though they may have been sold;[39] or if they have been merely exchanged for other goods;[40] or if the amount cannot be ascertained[41]—the action will not lie. The plaintiff must seek some other remedy.

It has been said that an action for money had and received will not lie unless there is some privity between the plaintiff and the defendant;[42] but there need be no privity other than such as arises out of the fact that the defendant has received the plaintiff's money, which in equity and good conscience he ought not to retain.[43]

Same—Debts Arising from Tort—Waiver of Tort

A frequent illustration of a quasi contractual obligation of this kind arises where a person obtains another's money by wrongful or fraudulent means. Where one person has wrongfully taken another's money, or has taken his property and converted it into money, the latter has

Vt. 624, 54 Am. Dec. 88; Smith v. Jernigan, 83 Ala. 256, 3 South. 515; Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; Moody v. Walker, 89 Ala. 619, 7 South. 246. *See "Money Received," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 6.*

[38] Leake, Cont. 50; Keener, Quasi Cont. 170; Lamine v. Dorrell, 2 Ld. Raym. 1216; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Parker v. Crole, 5 Bing. 63; Oughton v. Seppings, 1 Barn. & Adol. 241; Staat v. Evans, 35 Ill. 455; Notley v. Buck, 8 Barn. & C. 160; Olive v. Olive, 95 N. C. 485; Powell v. Rees, 7 Adol. & E. 426; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Barnett v. Warren, 82 Ala. 557, 2 South. 457; Thornton v. Strauss, 79 Ala. 164. *See "Money Received," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 6.*

[39] Budd v. Hiler, 27 N. J. Law, 43; Rosenberg v. Block, 54 N. Y. Super. Ct. 537. Receipt of equivalent. Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Doon v. Ravey, 49 Vt. 293. *See "Money Received," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 6.*

[40] Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318; Kidney v. Persons, 41 Vt. 386, 98 Am. Dec. 595. *See "Money Received," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 6.*

[41] Saville, Somes & Co. v. Welch, 58 Vt. 683, 5 Atl. 491; Glasscock v. Hazell, 109 N. C. 145, 13 S. E. 789. *See "Money Received," Dec. Dig. (Key-No.) § 3; Cent. Dig. § 6.*

[42] Sergeant v. Stryker, 16 N. J. Law, 464, 32 Am. Dec. 404. *See "Money Received," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 14–20.*

[43] Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Pugh v. Powell (Pa.) 11 Atl. 570; Drake v. Whaley, 35 S. C. 187, 14 S. E. 397. *See "Money Received," Dec. Dig. (Key-No.) § 5; Cent. Dig. §§ 14–20.*

a right of action ex delicto for the wrong done to him, as by an action of trespass or trover, or by an action on the case for the fraud. He is not always restricted, however, to an action ex delicto for the specific wrong, but may in general waive the tort,[44] and sue in assumpsit for the money as for money received for his use.[45]

The fundamental fact upon which this right of action depends is that the defendant has received money belonging to the plaintiff, or to which the plaintiff is entitled. It is not sufficient to show that the defendant has by fraud or wrong caused the plaintiff to pay money to others than the defendant, or to otherwise sustain loss or damage.[46] "Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort."[47]

[44] This expression is generally used. As pointed out by Prof. Keener, the doctrine of waiver of tort and suit in assumpsit is simply a question of the election of remedies. "The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and, if he elect to sue in assumpsit, he is said to waive the tort." Keener, Quasi Cont. 159; Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721. If the plaintiff waives the wrongful character of the taking, or makes his election, by recovering the money as a debt, or otherwise, he thereby precludes himself from taking advantage of it as a tort. Brewer v. Sparrow, 7 Barn. & C. 310; Lithgoe v. Vernon, 5 Hurl. & N. 180; Thompson v. Howard, 31 Mich. 309; Huffman v. Hughlett, 11 Lea (Tenn.) 549. He cannot accept the proceeds of his goods which have been wrongfully taken and sold, as a debt, and likewise claim damages for the injury done in the wrongful taking and sale. Brewer v. Sparrow, 7 Barn. & C. 310. Moreover, he cannot waive the wrong, or make his election in part only. Therefore, if he accepts part of the proceeds or price of the goods, he is bound to treat the balance as a debt. Lythgoe v. Vernon, 5 Hurl. & N. 180. A mere claim to a debt in respect of the value of goods wrongfully obtained, if not acquiesced in by the other party, does not constitute an election so as to waive the tort. Valpy v. Sanders, 5 C. B. 886. *See "Money Received," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 30.*

[45] Neate v. Harding, 6 Exch. 349; Cory v. Freeholders, 47 N. J. Law, 181; Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299; Loomis v. O'Neal, 73 Mich. 582, 41 N. W. 701; People v. Wood, 121 N. Y. 522, 24 N. E. 952; Kidney v. Persons, 41 Vt. 386, 98 Am. Dec. 595; Lubert v. Chauviteau, 3 Cal. 458, 58 Am. Dec. 415; Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Dashaway Ass'n v. Rogers, 79 Cal. 211, 21 Pac. 742; O'Conley v. City of Natchez, 1 Smedes & M. (Miss.) 81, 40 Am. Dec. 87. *See "Action," Dec. Dig. (Key-No.) § 28; "Assumpsit," Cent. Dig. §§ 42–54.*

[46] National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632. *See "Money Received," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 15, 21–27.*

[47] Keener, Quasi Cont. 160, citing, among other cases, Patterson v. Prior,

It is impossible within the scope of this work to go at much length into the different circumstances under which the law will create this obligation. It must suffice to mention the most important.

Where a person steals another's money or property, or obtains it by false pretenses, the fact that a crime has been committed will not prevent a civil action by the person injured. He may sue the thief in tort, or he may elect to sue in assumpsit as for money received for his use.[48]

The same is true in any case in which one person, by means of trespass, fraud, or other tortious means, obtains another's money.[49]

Same—Money Obtained by Fraud or Duress

Where a person has obtained money from another under an agreement which the latter has the right to avoid on the ground of fraud, duress, or undue influence, the latter, on avoiding the contract, may recover the amount as money received for his use.[50]

Money obtained by means of duress or compulsion may in like manner be recovered in assumpsit.[51] Duress may consist, as we have seen, in violence or unlawful imprisonment,[52] or threats of violence [53]

18 Ind. 440, 81 Am. Dec. 367; National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632; New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503; Tightmeyer v. Mongold, 20 Kan. 90; Fanson v. Linsley, 20 Kan. 235. And see Stockett v. Watkins' Adm'rs, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438. *See "Assumpsit, Action of," Dec. Dig. (Key-No.) § 8; Cent. Dig. §§ 42–54.*

[48] Holt v. Ely, 1 El. & Bl. 795; Chowne v. Baylis, 31 Law J. Ch. 757; Stone v. Marsh, 6 Barn. & C. 551; Hindmarch v. Hoffman, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842; Litt v. Martindale, 18 C. B. 314. *See "Money Received," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 30.*

[49] Catts v. Phalen, 2 How. 376, 11 L. Ed. 306; Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104; Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; Marsh v. Keating, 1 Bing. N. C. 198; Cory v. Freeholders, 47 N. J. Law, 181; Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299. *See "Money Received," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 30.*

[50] Thornett v. Haines, 15 Mees. & W. 367; Street v. Blay, 2 Barn. & Adol. 456; Dashaway Ass'n v. Rogers, 79 Cal. 211, 21 Pac. 742; Gompertz v. Denton, 1 Cromp. & M. 207; Foster v. Bartlett, 62 N. H. 617; ante, p. *See "Money Received," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 30.*

[51] Shaw v. Woodcock, 7 Barn. & C. 73; Atlee v. Backhouse, 3 Mees. & W. 633; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Preston v. City of Boston, 12 Pick. (Mass.) 7. On this subject generally, see ante, p. 293, and cases there collected. *See "Money Received," Dec. Dig. (Key-No.) § 8; Cent. Dig. § 30.*

[52] De Mesnil v. Dakin, L. R. 3 Q. B. 18. As we have seen in another connection, even a legal arrest and imprisonment may be duress if there is abuse of process. Ante, p. 300; Heckman v. Swartz, 64 Wis. 48, 24 N. W. 473. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440; "Payment," Dec. Dig. (Key-No.) § 87; Cent. Dig. §§ 283–287.*

[53] Ante, pp. 297–301.

or unlawful imprisonment,[54] in which cases it is duress of the person; or it may be duress of goods, as where property is wrongfully taken or withheld under oppressive circumstances.[55] Further than this, "where money has been obtained * * * by any kind of compulsion or oppression sufficient to render the payment involuntary," it may be recovered as a debt for money received for the use of the plaintiff.[56]

Same—Voluntary Payment

If a mere claim is made upon a person without any legal proceeding, and he pays it with full knowledge of all the circumstances of the claim, and without any compulsion or necessity, the payment is regarded as voluntary, and cannot be recovered back, though the claim was unfounded, and might have been successfully resisted.[57] It seems that it was at one time held that money voluntarily paid could be recovered back if the party receiving it was not entitled to it;[58] but

[54] Ante, p. 299. It must be remembered that it is unlawful to compound a felony, and that money paid to stifle a criminal prosecution cannot be recovered, ante, p. 366; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; Gotwalt v. Neal, 25 Md. 434; Dixon v. Olmstead, 9 Vt. 310, 31 Am. Dec. 629; unless the circumstances were such that the parties cannot be regarded as being in pari delicto; Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343; ante, p. 428. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440; "Payment," Dec. Dig. (Key-No.) § 87; Cent. Dig. §§ 283–287.*

[55] Ante, p. ——; Hills v. Street, 5 Bing. 37; Astley v. Reynolds, 2 Strange, 915; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Cobb v. Charter, 32 Conn. 358, 87 Am. Dec. 178; Preston v. City of Boston, 12 Pick. (Mass.) 7; Parcher v. Marathon Co., 52 Wis. 388, 9 N. W. 23, 38 Am. Rep. 745; Robertson v. Frank Bros. Co., 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236; Briggs v. Boyd, 56 N. Y. 289; Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581. Recovery of money exacted by carrier. Baldwin v. Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; Peters v. Railroad Co., 42 Ohio St. 275, 51 Am. Rep. 814; McGregor v. Railway Co., 35 N. J. Law, 89. *See "Contracts," Dec. Dig. (Key-No.) § 95; Cent. Dig. §§ 431–440.*

[56] Leake, Cont. 52, and authorities there collected; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Bulow v. Goddard, 1 Nott & McC. (S. C.) 45, 9 Am. Dec. 663; Westlake & Button v. City of St. Louis, 77 Mo. 47, 46 Am. Rep. 4; Lehigh Coal & Nav. Co. v. Brown, 100 Pa. 338; Swift & Co. v. U. S., 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341; Regan v. Baldwin, 126 Mass. 485, 30 Am. Rep. 689. Mere threat of suit is not compulsion so as to render a payment to prevent suit involuntary. Emmons v. Scudder, 115 Mass. 367; Awalt v. Association, 34 Md. 435. *See "Payment," Dec. Dig. (Key-No.) § 87; Cent. Dig. §§ 283–287.*

[57] Leake, Cont. 56; Spragg v. Hammond, 2 Brod. & B. 59; Denby v. Moore, 1 Barn. & Ald. 123; Morris v. Tarin, 1 Dall. 147, 1 L. Ed. 76, 1 Am. Dec. 233; Hall v. Shultz, 4 Johns. (N. Y.) 240, 4 Am. Dec. 270; Awalt v. Association, 34 Md. 435; Lemans v. Wiley, 92 Ind. 436. *See "Payment," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 254–266.*

[58] Moses v. Macferlan, 1 W. Bl. 219. *See "Payment," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 254–266.*

it is now virtually settled "that a party may in equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact, and without fraud upon his part." [59]

Same—Liability of Third Persons

If money wrongfully obtained has passed into the hands of a third person, the law will create a similar promise by him, unless he was a bona fide purchaser or recipient for value; that is, unless he gave a valuable consideration for the money, and had no notice of the fraud or other wrong by which it was obtained.[60] If he was a bona fide purchaser or recipient, he is not liable.[61] The same is true where goods wrongfully obtained or converted have passed into the hands of a third person, and have been converted into money.[62]

Same—Money Received without Fraud or Wrong

The right to recover money as having been received by the defendant for the use of the plaintiff is not limited to cases in which the money has been obtained by a tortious act, but extends to many cases in which it has been rightfully obtained, but cannot be rightfully kept.[63] Where a person, for instance, has obtained money from another under an agreement which the latter is entitled to avoid, and does avoid, because of want or failure of consideration,[64] or because of mistake,[65] or because of want of capacity by reason of infancy or insanity,[66] or because of the other party's failure to perform his part of the agreement,[67] the money may be recovered. The money, though

[59] Brisbane v. Dacres, 5 Taunt. 144; Regan v. Baldwin, 126 Mass. 485, 30 Am. Rep. 689; Benson v. Monroe, 7 Cush. (Mass.) 125, 54 Am. Dec. 716. *See "Payment," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 254–266.*

[60] Calland v. Loyd, 6 Mees. & W. 26; Bayne v. U. S., 93 U. S. 642, 23 L. Ed. 997; Mason v. Prendergast, 120 N. Y. 536, 24 N. E. 806; Atlantic Cotton Mills v. Orchard Mills, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698; Hindmarch v. Hoffman, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842; Harrison Mach. Works v. Coquillard, 26 Ill. App. 513; ante, p. 295. *See "Money Received," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 31.*

[61] Foster v. Green, 7 Hurl. & N. 881. And see Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Newhall v. Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712; Stephens v. Board, 79 N. Y. 187; 35 Am. Rep. 511; State Nat. Bank v. U. S., 114 U. S. 401, 5 Sup. Ct. 888, 29 L. Ed. 149. *See "Money Received," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 31.*

[62] Glyn v. Baker, 13 East, 509; Graham v. Dyster, 6 Maule & S. 1; Down v. Halling, 4 Barn. & C. 330. *See "Money Received," Dec. Dig. (Key-No.) § 9; Cent. Dig. § 31.*

[63] Johnson's Ex'x v. Jennings' Adm'r, 10 Grat. (Va.) 1, 60 Am. Dec. 323; Schaeffer v. Miller, 41 Mont. 417, 109 Pac. 970, 137 Am. St. Rep. 746. *See "Money Received," Dec. Dig. (Key-No.) § 6; Cent. Dig. §§ 15, 21–27.*

[64] Post, p. 640.

[65] Post, p. 637; ante, p. 258.

[66] Ante, pp. 218, 232.

[67] Philipson v. Bates' Ex'r, 2 Mo. 116, 22 Am. Dec. 444; post, p. 640. *See "Money Paid," Dec. Dig. (Key-No.) §§ 6, 15; Cent. Dig. §§ 21–27, 44–50.*

obtained without wrong, cannot be rightfully and justly withheld after the contract has been avoided, and the law therefore creates an obligation to repay it.

Same—Money Paid under a Mistake of Fact

An important class of cases in which an action will lie as for money received by the defendant for the use of the plaintiff is where money is paid under a mistake of fact. As a rule, whenever a person makes a payment to another under such a mistake as to material facts as to create a belief in the existence of a liability to pay which does not really exist, the money may be recovered back as having been received by the person to whom it was paid for the use of the person paying it.[68] If the mistake is caused by the fraud of the person receiving the money, or if he knows of the mistake when he receives the money, the case will fall within the class which we have already considered.[69] We are speaking here of cases in which the mistake is not induced by fraud, and in which both parties may act in perfect good faith. Such an obligation arises where money is paid as due upon the basis of erroneous accounts, and upon a true statement of account is found not to have been due. It may be recovered as money received for the plaintiff's use.[70] The money must have been paid under the belief that it was due. If the plaintiff knew that it was not due, and voluntarily paid it because he thought he could not show that it was not due, or for any other reason, it cannot be recovered back. This is not ignorance of fact, but ignorance of the means of proving a fact.[71] The mere fact that the party paying the money suspects that it is not due does not bring the case within this rule. He must believe it is not

[68] Bize v. Dickason, 1 Term R. 285; Citizens' Bank v. Grafflin, 31 Md. 507, 1 Am. Rep. 66; Barber v. Brown, 1 C. B. (N. S.) 121; Milnes v. Duncan, 6 Barn. & C. 671; Mills v. Guardians of the Poor, 8 Exch. 590; Mayer v. City of New York, 63 N. Y. 455; Rheel v. Hicks, 25 N. Y. 289; Hazard v. Insurance Co., 7 R. I. 429; Holtz v. Schmidt, 59 N. Y. 253; Clark v. Sylvester (Me.) 13 Atl. 404; McDonald v. Lynch, 59 Mo. 350; Glenn v. Shannon, 12 S. C. 570. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[69] Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161. This distinction, for several reasons, may become important. Where there is no fraud, for instance, a demand before suit is necessary; but where there is fraud (and it amounts to fraud if the other party knew of the mistake), demand is not necessary. Sharkey v. Mansfield, supra; Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[70] Dails v. Lloyd, 12 Q. B. 531; Townsend v. Crowdy, 8 C. B. (N. S.) 477; Stuart v. Sears, 119 Mass. 143; Keenholts v. Church, 57 Hun, 589, 10 N. Y. Supp. 615. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[71] Keener, Quasi Cont. 26; Windbiel v. Carroll, 16 Hun (N. Y.) 101. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

due.[72] It is essential that there shall have been a mistake of a material fact. A voluntary payment with knowledge of all facts cannot be recovered, even though there may have been no obligation to pay.[73] By the weight of authority, if the mistake occurs and causes the payment, it is immaterial that it arose from negligence or want of diligent inquiry on the part of the plaintiff, or from forgetfulness, or the fact that he had the means of knowledge;[74] provided, however, the defendant has not so changed his position that he cannot be placed in statu quo.[75] If the money is intentionally paid "without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false," it cannot be recovered.[76] A compromise, therefore, cannot be repudiated, and money paid recovered, on the ground of mistake, where it was made without reference to the truth or falsity of facts.[77] But it is otherwise if there was a mistake as to a fact which was believed to be true, and on the belief in the truth of which the compromise was made.[78]

[72] Keener, Quasi Cont. 28; National Life Ins. Co. v. Jones, 1 Thomp. & C. (N. Y.) 466 [affirmed 59 N. Y. 649]. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[73] Adams v. Reeves, 68 N. C. 134, 12 Am. Rep. 627; Lemans v. Wiley, 92 Ind. 436. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[74] Kelly v. Solari, 9 Mees. & W. 54; Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92; Devine v. Edwards, 101 Ill. 138; Lawrence v. Bank, 54 N. Y. 432; Bell v. Gardiner, 4 Man. & G. 11; Townsend v. Crowdy, 8 C. B. (N. S.) 477; Waite v. Leggett, 8 Cow. (N. Y.) 195, 18 Am. Dec. 441; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Brown v. Road Co., 56 Ind. 110; Rutherford v. McIvor, 21 Ala. 750; Baltimore & S. R. Co. v. Faunce, 6 Gill (Md.) 68, 46 Am. Dec. 655; Koontz v. Bank, 51 Mo. 275; Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Citizens' Bank v. Rudisill, 4 Ga. App. 37, 60 S. E. 818. Contra, Brummitt v. McGuire, 107 N. C. 351, 12 S. E. 191; Wilson v. Barker, 50 Me. 447. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[75] Keener, Quasi Cont. 71; Walker v. Conant, 65 Mich. 194, 31 N. W. 786. A change of position which is not irrevocable does not prevent a recovery. Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[76] Kelly v. Solari, 9 Mees. & W. 54; McArthur v. Luce, 43 Mich. 435, 5 N. W. 451, 38 Am. Rep. 204; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Buffalo v. O'Malley, 61 Wis. 255, 20 N. W. 913, 50 Am. Rep. 137; Bergenthal v. Fiebrantz, 48 Wis. 435, 4 N. W. 89; Troy v. Bland, 58 Ala. 197. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[77] See cases cited supra, note 76.

[78] Rheel v. Hicks, 25 N. Y. 289; Wheadon v. Olds, 20 Wend. (N. Y.) 174; Stuart v. Sears, 119 Mass. 143. *See "Compromise and Settlement," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 67–75; "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

A person cannot recover money paid under a mistake of fact if he has received the equivalent for which he bargained, so that there is no failure of consideration; and it is immaterial that he need not, and would not, have made the payment if he had known the true state of facts. Where a bank, for instance, pays the check of a depositor under the erroneous belief that it has sufficient funds, it may not recover from the payee the excess paid him over the amount to the depositor's credit.[79] And it makes no difference that because of the overdraft it had a right to refuse to pay anything on the check.[80] So the drawee may not recover money paid by mistake on a forged check or bill of exchange.[81]

In order that money paid may be recovered on the ground of a mistake of fact, the mistake must be as to a fact material to the legal duty to pay or to the legal right to receive something in return; and it is not sufficient that payment was made under a mistake which merely made it seem desirable or advantageous to pay.[82]

Same—Money Paid under a Mistake of Law

The rule was established in England by Lord Ellenborough in the case of Bilbie v. Lumley[83] that money paid with a full knowledge of matters of fact, but under a mistake of law, may not be recovered, even though it be inequitable for the defendant to retain it; and this rule has been very generally recognized in this country.[84] It has

[79] Chambers v. Miller, 13 C. B. N. S. 125, 32 L. J. C. P. 30, 9 Jur. N. S. 626, 11 W. R. 236, 7 L. T. N. S. 856, 84 Rev. Rep. 479; Nat. Bank v. Berrall, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Ann. Cas. 630 (where payment had been stopped); Citizens' Bank v. Schwarzschild, 109 Va. 539, 64 S. E. 954, 23 L. R. A. (N. S.) 1092 and note. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[80] See cases cited supra, note 79.

[81] Woodward, Quasi Cont. 126. Mistake as to genuineness of drawer's signature. Price v. Neal, 3 Burr. 1354. "The Doctrine of Price v. Neal," by Prof. J. B. Ames, 4 Harv. Law Rev. 297. As to indorser's signature. La Fayette & Bro. v. Merchants' Bank, 73 Ark. 561, 84 S. W. 700, 68 L. R. A. 231, 108 Am. St. Rep. 71. As to body of instrument. Bank of Commence v. Union Bank, 3 N. Y. 230. *See "Banks and Banking," Dec. Dig. (Key-No.) §§ 143, 148; Cent. Dig. §§ 414, 438–446, 517; "Bills and Notes," Dec. Dig. (Key-No.) § 434; Cent. Dig. §§ 1268–1274; "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[82] Aiken v. Short, 1 Hurl. & Nor. 210; Harris v. Loyd, 5 Mees. & Wels. 432; Buffalo v. O'Malley, 61 Wis. 255, 20 N. W. 913; 50 Am. Rep. 137; Franklin Bank v. Raymond, 3 Wend. (N. Y.) 69. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281.*

[83] 2 East, 469 (1802). *See "Payment," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 267–271.*

[84] Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373; Belloff v. Dime Savings Bank, 118 App. Div. 20, 103 N. Y. Sup. 273 [affirmed 191 N. Y. 551, 85 N. E. 1106]; Alton v. First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144,

recently been severely criticised,[85] however, and has been rejected by the courts in at least two jurisdictions,[86] and has been modified by statute in others.[87]

There is no presumption that a citizen of one state knows the laws of another state, and accordingly money paid by a citizen of one state under a mistake as to the laws of a foreign state may be recovered.[88]

Same—Want or Failure of Consideration—Failure of Other Party to Perform

We may class with payments made under mistake payments which are allowed to be recovered because of want or failure of consideration, for in all cases where a recovery is allowed on this ground there has been a misapprehension. The party who has paid the money has not gotten what he supposed, or had a right to suppose, he was getting, or would get, in return for his money. Thus, where a person bought a bar of silver by weight, and, by an error in assaying it, paid for a greater weight than it contained, he was allowed to recover the excess from the seller as money received for his use.[89] It needs no argument to show that this is a case of mistake. In like manner, if the purchaser of goods has paid the price, and the seller fails to deliver the goods, the purchaser may recover the money paid as money

34 Am. St. Rep. 285; Vanderbeck v. City of Rochester, 122 N. Y. 285, 25 N. E. 408; Clarke v. Dutcher, 9 Cow. (N. Y.) 674; Wayne Co. v. Randall, 43 Mich. 137, 5 N. W. 75; Birkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130; Valley Ry. Co. v. Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219; Porter v. Jefferies, 40 S. C. 92, 18 S. E. 229; Mutual Sav. Inst. v. Enslin, 46 Mo. 200; Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; Snelson v. State, 16 Ind. 29; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; Real Estate Sav. Inst. v. Linder, 74 Pa. 371; Townsend v. Cowles, 31 Ala. 428; Newell v. March, 30 N. C. 441; Christy v. Sullivan, 50 Cal. 337; Osburn v. Throckmorton, 90 Va. 311, 18 S. E. 285; ante, p. 256. A payment made under a mistake both of fact and of law has been denied. Needles v. Burk, 81 Mo. 569, 51 Am. Rep. 251. *See "Payment," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 267–271.*

[85] Woodward, Quasi Cont. 57.

[86] Northrop's Ex'rs v. Graves, 19 Conn. 548, 50 Am. Dec. 264; McMurtry v. Kentucky Central R. Co., 84 Ky. 462, 1 S. W. 815. *See "Payment," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 267–271.*

[87] See Woodward, Quasi Cont. 62, where it is said to have been modified by statute in California, Georgia, Montana, North Dakota, South Dakota, and Oklahoma. *See "Payment," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 267–271.*

[88] Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Vinal v. Continental Const., etc., Co., 53 Hun, 247, 6 N. Y. Supp. 595. *See "Payment," Dec. Dig. (Key-No.) § 84; Cent. Dig. §§ 267–271.*

[89] Cox v. Prentice, 3 Maule & S. 344. And see Devine v. Edwards, 101 Ill. 138; Noyes v. Parker, 64 Vt. 379, 24 Atl. 12. *See "Payment," Dec. Dig. (Key-No.) § 85; Cent. Dig. §§ 272–281; "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

received for his use.[90] And in any case where a person has paid money under an agreement which he is entitled to rescind, and does rescind, for want or failure of consideration, he may recover what he has paid.[91] The action will lie, for instance, against a person who sells goods as his own, but which are not his own, where the real owner subsequently claims them from the purchaser;[92] or against a person who sells bills, notes, bonds, stock, or other securities, which turn out to be forgeries, or for some other reason to be worthless;[93] or against a person who contracts to transfer the title to land, where because of his want of title, or for other reasons, no title passes.[94]

As a rule, the failure of consideration must be total in order to entitle a person to recover money paid under a contract. If he has in fact received a part of the consideration, so that the failure of consideration is only partial, his remedy, if he has any, is for breach of the contract under which the money was paid.[95] This is in accord with the rule which we have heretofore stated—that money paid under a mistake cannot be recovered if an equivalent has been received. Where a specific article is sold with a warranty of its quality, and is not altogether worthless, a mere breach of the warranty does not entitle the purchaser to recover the price paid. His remedy is by action for damages for breach of warranty.[96] Where the consideration

[90] Giles v. Edwards, 7 Term R. 181; Devaux v. Conolly, 8 C. B. 640. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[91] Claflin v. Godfrey, 21 Pick. (Mass.) 1; Newsome v. Graham, 10 Barn. & C. 234; Giles v. Edwards, 7 Term R. 181; Johnson's Ex'x v. Jennings' Adm'r, 10 Grat. (Va.) 1, 60 Am. Dec. 323; Earle v. Bickford, 6 Allen (Mass.) 549, 83 Am. Dec. 651. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[92] Eicholz v. Bannister, 34 Law J. C. P. 105; ante, p. 586. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[93] Claflin v. Godfrey, 21 Pick. (Mass.) 1; Ripley v. Case, 86 Mich. 261, 49 N. W. 46; Westropp v. Solomon, 8 C. B. 345; Jones v. Ryde, 5 Taunt. 488; Gurney v. Womersley, 4 El. & Bl. 133; Watson v. Cresap, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; Young v. Cole, 3 Bing. N. C. 724; Burchfield v. Moore, 3 El. & Bl. 683; Moore v. Garwood, 4 Exch. 681; Wood v. Sheldon, 42 N. J. Law, 421, 36 Am. Rep. 523; ante, p. 586. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[94] Cripps v. Reade, 6 Term R. 606; Schwinger v. Hickok, 53 N. Y. 280; Earle v. Bickford, 6 Allen (Mass.) 549, 83 Am. Dec. 651; Wright v. Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602. And see McGoren v. Avery, 37 Mich. 120; Merryfield v. Willson, 14 Tex. 224, 65 Am. Dec. 117; ante, p. 588. See Keener, Quasi Cont. 125. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[95] Hunt v. Silk, 5 East, 783; Rand v. Webber, 64 Me. 191; Blackburn v. Smith, 2 Exch. 783; Harnor v. Groves, 15 C. B. 667; Smart v. Gale, 62 N. H. 62. *See "Money Received," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 9, 10.*

[96] Gompertz v. Denton, 1 Cromp. & M. 207. But in those jurisdictions in which a contract may be rescinded upon breach of warranty, money paid

is severable, however, so that the money paid for a portion of it may be ascertained, a partial failure may entitle the plaintiff to recover the part of the money paid in respect of that part of the consideration which has failed.[97]

A person can never recover money paid on the ground that the consideration has failed, if he has obtained the specific consideration which he bargained for, though it may turn out to be of no value;[98] as, for instance, where he has bought land or goods, intending to take his chances as to the seller's title, or where he has bought stock, bonds, or other property, and taken the chance of their being of value.[99] There must, as we have said, have been a misapprehension.

Where the failure of consideration was caused by the default of the plaintiff, he cannot recover the money paid for it.[1]

Same—Money Paid under Unenforceable Contract

Money paid under an agreement unenforceable because of the statute of frauds may be recovered upon the default of the defendant in the performance of his part of the agreement;[2] but, by the weight of authority, it may not be recovered so long as the defendant is not in default.[3]

Same—Money Paid under Illegal Contract

Though, as we have seen, no action will lie to enforce an illegal contract, an action will be allowed, under some circumstances, in disaffirmance of it. Ordinarily, where one of the parties has paid money under an illegal contract, he cannot sue to recover it back. The law will leave him where he has placed himself.[4] To this rule, as we have

may be recovered upon return of the consideration as to which the warranty was broken. See ante, p. 581. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[97] Devaux v. Conolly, 8 C. B. 640; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Laflin v. Howe, 112 Ill. 253. *See "Sales," Dec. Dig. (Key-No.) § 391; Cent. Dig. §§ 1110–1127.*

[98] Westlake v. Adams, 5 C. B. (N. S.) 266; Taylor v. Hare, 1 Bos. & P. (N. R.) 260; Lambert v. Heath, 15 Mees. & W. 486; ante, p. 586. *See "Money Received," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 9, 10.*

[99] Morley v. Attenborough, 3 Exch. 500; Lambert v. Heath, 15 Mees. & W. 486; Westlake v. Adams, 5 C. B. (N. S.) 266. *See "Money Received," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 9, 10.*

[1] Stray v. Russell, 1 El. & El. 888, 916. *See "Money Received," Dec. Dig. (Key-No.) § 4; Cent. Dig. §§ 9, 10.*

[2] Richards v. Allen, 17 Me. 296; Durham v. Wick, 210 Pa. 128, 59 Atl. 824, 105 Am. St. Rep. 789, 2 Ann. Cas. 929. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 327–333.*

[3] Thomas v. Brown, 1 Q. B. D. 714; York v. Washburn (C. C.) 118 Fed. 316; McKinney v. Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640. Contra, King v. Welcome, 5 Gray (Mass.) 41. *See "Frauds, Statute of," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 327–333.*

[4] Holman v. Johnson, 1 Cowp. 341; Touro v. Cassin, 1 Nott & McC. (S. C.)

seen, there are some exceptions. Where the contract is still executory, except for a payment of money made by one of the parties to the other, and is not of such a character that the illegal object is effected by the mere payment, and is malum prohibitum, and not malum in se, there is a locus pœnitentiæ, and the party who has paid the money may withdraw from the contract, and recover what he has paid as money received for his use.[5] The law creates a quasi contractual obligation, on the part of the party who has received the money, to repay it. Another exception is where the parties are not in pari delicto. Where the party who has paid money under an illegal contract entered into the contract under the influence of fraud or strong pressure, or where the law which makes the contract unlawful was intended for his protection, he is not regarded as being in pari delicto with the other party, and may recover what he has paid.[6]

Same—Money Paid under Ultra Vires Contract

A contract made by a corporation beyond the scope of its corporate powers is said to be ultra vires, and is void, but not illegal.[7] It is very generally held, therefore, that money paid under such a contract may be recovered.[8] In England an exception is made to the right of recovery in the case of money borrowed by the corporation unless it remains unused in its treasury, on the ground that to permit a recovery in this case would be to enforce the void contract of loan;[9] but this exception is not recognized by the United States Supreme Court,[10] nor by the majority of the state courts.[11]

173, 9 Am. Dec. 680; Waite v. Merrill, 4 Greenl. (Me.) 102, 16 Am. Dec. 238; ante, p. 423. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[5] Ante, p. 428. See, also, Bernard v. Taylor, 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; Hermann v. Charlesworth, [1905] 2 K. B. 123, 74 Law J. K. B. 620, 93 Law T. 284, 54 Wkly. Rep. 22, 21 Times Law R. 368. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[6] Ante, p. 425.

[7] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. And see ante, p. 428. *See "Payment," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 254–266.*

[8] In re Phœnix Life Assurance Co., 2 Johns. & Hem. 411; Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 18 S. Ct. 808, 43 L. Ed. 108; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781. *See "Corporations," Dec. Dig. (Key-No.) § 446; Cent. Dig. § 1785; "Payment," Dec. Dig. (Key-No.) § 82; Cent. Dig. §§ 254–266.*

[9] Chambers v. Railroad Co., 5 Barn. & Cress. 588; In re Wrexham, etc., R. Co., [1899] 1 Ch. 440. *See "Corporations," Dec. Dig. (Key-No.) § 446; Cent. Dig. § 1785.*

[10] Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611. *See "Corporations," Dec. Dig. (Key-No.) § 446; Cent. Dig. § 1785.*

[11] Woodward, Quasi Cont. 255. Money borrowed by a municipal corpora-

RECOVERY FOR BENEFITS CONFERRED

273. Under certain circumstances, where one person has conferred upon another benefits in the way of property, services, etc., and cannot show a promise in fact by the latter to pay for them, the law will create an obligation, because of the receipt of the benefits, to pay what they are reasonably worth.

As we have seen, if a man delivers goods to another, or performs services for him, not under such circumstances as to lead the latter to believe them a gift, and the latter accepts them or acquiesces, a promise to pay for them will be implied as a fact. Here there is a true contract shown by the conduct of the parties. Goods may be delivered, however, or services rendered, under circumstances showing that there is no agreement in fact, or that, though there was an agreement, a condition has not been performed by one of the parties so as to entitle him to sue the other on it, or for some reason it is unenforceable, or is illegal. Under these circumstances the law will sometimes create an obligation to pay for the goods delivered or services rendered.[12] There has, in these cases, been an agreement in fact, which for some reason will not support an action, and the goods have been delivered, or the services rendered, under this agreement. It needs no argument to show that you cannot imply as a fact any other promise to pay than the unenforceable promise proved to have been made. The question is one of evidence, and the promise shown to have been made in fact prevents the implication of any other promise in fact. Any implied promise to pay must be implied as a matter of law, or created by the law, and must therefore be quasi contractual, and not contractual. We cannot go at much length into the various circumstances under which such a promise will be created, but will mention some of the most important.

Same—Liability for Necessaries

We have seen that, though an infant or an insane or drunken person is ordinarily incapable of making a contract which will bind him, he is liable for necessaries furnished him. He is not liable for what he

tion ultra vires may not be recovered, if such recovery would increase the burden of taxation. Id. 258.

[12] Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Turner v. Webster, 24 Kan. 38, 36 Am. Rep. 251. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. § 122; "Sales," Dec. Dig. (Key-No.) § 360; Cent. Dig. §§ 1060–1062.*

may have agreed to pay for them, but only for what they are worth. It would seem from this that the promise is one created by law, and therefore quasi contractual.[13] To so regard it would make the law more consistent. It does not seem consistent to say that because of the immature judgment of an infant, or because of the diseased mind of a lunatic, he cannot consent, and therefore cannot enter into a binding agreement, and to say in the next breath that he may bind himself for necessaries. It is better to say that the law makes him liable for necessaries. As we have seen, however, many of the courts regard the liability as based upon the express promise. They allow an action, for instance, on a note, or other express promise, given for necessaries, provided it is such that the consideration may be inquired into, so that the recovery may be limited to what the necessaries are reasonably worth.[14]

We have also seen that, where a husband leaves his wife without means of support, the law gives her authority to pledge his credit to obtain necessaries. Not only is this true, but the law will hold a husband liable in assumpsit for necessaries furnished his abandoned wife while she is unconscious, and will hold an insane or infant husband liable for necessaries furnished his wife. The liability thus imposed upon the husband is imposed by law without his consent, and is clearly quasi contractual.[15] Under like circumstances a man may be liable for necessaries furnished his children.[16]

Same—Forcing Benefit upon Another

Neither a liability ex contractu nor a liability quasi ex contractu can be imposed upon a person otherwise than by his act or consent. One man cannot force a benefit upon another without his knowledge or consent, and then compel him to pay for it.[17] If a person intentionally and knowingly performs services for another, or otherwise con-

[13] Keener, Quasi Cont. 20; ante, p. 199; Rhodes v. Rhodes, 44 Ch. Div. 94; Sceva v. True, 53 N. H. 627; Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761; Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; Earle v. Reed, 10 Metc. (Mass.) 387. *See "Infants," Dec. Dig. (Key-No.) § 50; Cent. Dig. §§ 114–127; "Insane Persons," Dec. Dig. (Key-No.) § 75; Cent. Dig. §§ 89, 128, 129.*

[14] Ante, p. 199.

[15] Ante, p. 199; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Chapple v. Cooper, 13 Mees. & W. 252; Turner v. Frisby, 1 Strange, 168. *See "Husband and Wife," Dec. Dig. (Key-No.) § 19; Cent. Dig. §§ 109–146.*

[16] Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272; In re Ryder, 11 Paige (N. Y.) 185, 42 Am. Dec. 109. But see Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499. *See "Parent and Child," Dec. Dig. (Key-No.) § 3; Cent. Dig. §§ 33–62.*

[17] Ante, p. 440.

fers a benefit upon him, without his knowledge, so that he has no opportunity to refuse the benefit, the law will not create a liability to pay for it.[18] So, where a person supplies another with goods, the latter supposing that he is being supplied by another person with whom he has contracted for the goods, the law not only will not imply a promise in fact to pay for the goods, but it will not even create a promise.[19]

Same—Benefits Rendered Gratuitously

If benefits are conferred gratuitously, the law will not create a promise to pay for them, even though they may have been requested.[20] A person, for instance, who has rendered services for another in the absence of any intention of charging for them on the one side, or of paying for them on the other, cannot afterwards recover for them.[21] Where necessaries are furnished to an infant, or an unconscious person, with the intention of charging for them, the law, as we have seen, will create a promise to pay their reasonable value. Where, however, there is no intention at the time to charge for the necessaries furnished, the law will not create a liability.[22]

Same—Goods Wrongfully Obtained—Waiver of Tort

We have seen that, where goods are wrongfully obtained and converted into money, an action will lie by the owner to recover the money received as money received for his use. Such an action does not lie where the goods are retained by the wrongdoer, and not sold. As to whether, in such a case, the owner must sue in tort, as he may do, of course, or whether he may waive the tort, and sue in assumpsit for the value of the goods as upon a fictitious sale, the authorities

[18] Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Dunbar v. Williams, 10 Johns. (N. Y.) 249; Glenn v. Savage, 14 Or. 567, 13 Pac. 442; Earle v. Coburn, 130 Mass. 596; Shaw v. Graves, 79 Me. 166, 8 Atl. 884. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

[19] BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9, Throckmorton Cas. Contracts, 305; Schmaling v. Thomlinson, 6 Taunt. 147. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

[20] Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678; Brown v. Tuttle, 80 Me. 162, 13 Atl. 583; Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; Doyle v. Trinity Church, 133 N. Y. 372, 31 N. E. 221; Patterson v. Collar, 31 Ill. App. 340; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; ante, p. 50. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

[21] Cicotte v. Church of St. Anne, 60 Mich. 552, 27 N. W. 682. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

[22] St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86; Shepherd v. Young, 8 Gray (Mass.) 152, 69 Am. Dec. 242. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

are conflicting. Some courts allow such an action,[23] while others do not.[24]

Same—Part Performance of Contract

As we have seen in treating of discharge of contract by breach, a party to a contract is not discharged from liability to perform by the failure of the other party to perform a part of his promise which is merely subsidiary, and does not go to the essence of the contract; nor, where a contract consists of several promises based on several considerations, so that the promises are divisible, does a failure to perform one or more discharge the other party from liability to pay for those that have been performed. In these cases the party thus partially in default may recover for what he has done, leaving the other party to recover damages from him for his partial breach. The recovery is on the contract itself. Where, however, the breach is not merely of a subsidiary promise, or of one or more of several promises, but of a term which the parties regarded as of the essence of the contract, or there is a failure to fully perform an indivisible promise, the question arises whether the other party is liable for the benefits he has received from the partial performance. That he is not liable on the contract itself is clear, for he can only recover on it by showing that he has substantially performed what he has agreed to perform as a condition precedent to the other's liability. The other party has not agreed to pay him for a partial performance, and any liability must be created by the law without agreement, or quasi ex contractu.

Under certain circumstances such a liability is created. The right to recover is based, not on principles of the law of contract, but on equitable principles; and it would be beyond the scope of our work to go into the subject at any length. It must suffice to call attention to a few of the most important cases in which such a recovery has been allowed. Where a person has willfully refused or failed to fully perform a contract which he was bound to perform, it is clear that he should not, and cannot, recover, for what he has performed un-

[23] Russell v. Bell, 10 Mees. & W. 340; Willson v. Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Toledo, W. & W. Ry. Co. v. Chew, 67 Ill. 378; Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Goodwin v. Griffis, 88 N. Y. 629; Walker v. Duncan, 68 Wis. 624, 32 N. W. 689; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Blalock v. Phillips, 88 Ga. 216; Dietz's Assignee v. Sutcliffe, 80 Ky. 650; Morford v. White, 53 Ind. 547; Newton Mfg. Co. v. White, 53 Ga. 395; Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; Logan v. Wallis, 76 N. C. 416. *See "Action," Dec. Dig. (Key-No.) § 28; Cent. Dig. §§ 196–215; "Assumpsit," Cent. Dig. §§ 42–54.*

[24] Jones v. Hoar, 5 Pick. (Mass.) 285; Allen v. Ford, 19 Pick. (Mass.) 217; Androscoggin Water Power Co. v. Metcalf, 65 Me. 40; Bethlehem Borough v. Fire Co., 81 Pa. 445; Sandeen v. Railroad Co., 79 Mo. 278; Galloway v.

der it.[25] If his default was not willful, but because of sickness, death, prevention by the other party, or any other cause, not arising from his own fault, and excusing the breach, then he can recover from the other party on a promise created by the law to pay for the benefits he has received from the part performance.[26] And, by the weight of authority, where one of the parties to a contract has endeavored in good faith to perform it, and has substantially done so, and thereby conferred a substantial benefit on the other party, though he has failed to perform the contract in some particulars, he may recover what the partial performance is reasonably worth, having regard, however, to the contract price.[27] In England, and in some jurisdictions in this country, a recovery is not allowed for improvements on a building which is destroyed without fault of the contractor before the completion of the contract;[28] but by the weight of American authority recovery may be had in such a case for the value of the work performed.[29]

Holmes, 1 Doug. (Mich.) 330 (but see Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280); Winchell v. Noyes, 23 Vt. 303; Strother's Adm'r v. Butler, 17 Ala. 733; Ferguson v. Carrington, 9 Barn. & C. 59. But see Russell v. Bell, 10 Mees. & W. 340. *See "Action," Dec. Dig. (Key-No.) § 28; Cent. Dig. §§ 196–215; "Assumpsit," Cent. Dig. §§ 42–54.*

[25] Ante, pp. 539, 578, 579, and cases cited in notes 19, 20; Carbon Hill Coal Co. v. Cunningham, 153 Ala. 573, 44 South. 1016. *See "Work and Labor," Dec. Dig. (Key-No.) §§ 9, 14; Cent. Dig. §§ 23–33.*

[26] Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Robinson v. Davison, L. R. 6 Exch. 269; Boast v. Firth, L. R. 4 C. P. 1; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Jones v. Judd, 4 N. Y. 412; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Green v. Gilbert, 21 Wis. 395; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Martus v. Houck, 39 Mich. 431, 33 Am. Rep. 409; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; Pinches v. Lutheran Church, 55 Conn. 183, 10 Atl. 264; Shultz v. Johnson, 5 B. Mon. (Ky.) 497; Adams v. Crosby, 48 Ind. 153; Harrington v. Iron-Works Co., 119 Mass. 82; Stewart v. Loring, 5 Allen (Mass.) 306, 81 Am. Dec. 747; Fuller v. Brown, 11 Metc. (Mass.) 440; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62; Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444; Gilman v. Hall, 11 Vt. 510, 34 Am. Dec. 700; Fenton v. Clark, 11 Vt. 557; Hubbard v. Belden, 27 Vt. 645; Yerrington v. Green, 7 R. I. 589, 84 Am. Dec. 578; Norris v. School Dist., 12 Me. 293, 28 Am. Dec. 182; Wadleigh v. Town of Sutton, 6 N. H. 15, 23 Am. Dec. 704; Mooney v. Iron Co., 82 Mich. 263, 46 N. W. 376; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; ante, p. 586. *See "Work and Labor," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 23–33.*

[27] Ante, p. 539.

[28] Appleby v. Myers, L. R. 2 C. P. 651; Huyett Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272; Krause v. Bd. of Trustees, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203, 1 Ann. Cas. 460. *See "Work and Labor," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 23–33.*

[29] Young v. City of Chicopee, 186 Mass. 518, 72 N. E. 63; Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1008 [affirmed 162 N. Y. 610, 57 N. E. 1112];

If, by the express terms of the contract, there is no liability except upon a full performance, there can be no recovery for a part performance, even where the contract is divisible, and a full performanee is prevented by death or other cause beyond the control of the parties. The terms of the express contract exclude the arising of any such implied contract as could form the basis of a claim upon a quantum meruit.[80]

Same—Retaining Benefits

Where benefits are conferred by one person on another under such circumstances as to raise no promise in fact or in law to pay for them, he may nevertheless become liable by retaining them. If a person, for instance, were to receive goods from another, reasonably but mistakenly believing them to be intended as a gift, and, after learning of his mistake, should retain them, when he might return them, or, by the weight of authority, if he should receive part of the goods purchased from another, and retain them after failure of the latter to supply the rest of the goods, the law would compel him to pay for them.[81] And the same rule would apply where benefits are in any other way received under such circumstances as to create no contractual oblition, and are retained when they should in justice be returned. If, however, the benefits thus received are incapable of being returned, as where they consist of services, or of material which has been used in repairing a house,[82] it would seem that no liability should be created. If a man engages a servant for a specified time, and agrees to pay him if he works for that time, his rendition of the services is a condition precedent to his right to recover for them on the contract. If he leaves his employer's service, without excuse, before the time has expired, he certainly cannot recover on the contract without a violation of the plainest principles of the law of contract. The master cannot return the benefit he has received from the part performance, and he should not be held liable to pay for it. Some courts allow the servant to recover on the quantum meruit, though he has broken his contract without excuse. The weight of authority, however, is to the contrary.[83]

Ganong & Chenoweth v. Brown, 88 Miss. 53, 40 South. 556, 117 Am. St. Rep. 731. *See "Work and Labor," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 23–33.*

[80] Cutter v. Powell, 6 Term R. 320; Appleby v. Dods, 8 East, 300. *See "Work and Labor," Dec. Dig. (Key-No.) § 9; Cent. Dig. §§ 23–33.*

[81] Oxendale v. Wetherell, 9 B. & C. 286, and cases cited, ante, p. 568, note 80. But see, contra, Champlin v. Rowley, 18 Wend. (N. Y.) 187, and cases cited, ante, p. 568, note 80. *See "Contracts," Dec. Dig. (Key-No.) § 27; Cent. Dig. §§ 121–132.*

[82] Ante, p. 540.

[83] Ante, p. 579.

Same—Part Performance of Illegal Contract

Difficult questions have arisen where it has been sought to recover for benefits conferred under an illegal contract. We have already seen that an action for money had and received will lie to recover money paid under an illegal contract which has not been carried out, provided the illegal object has not been effected by the mere payment of the money, and provided the object is malum prohibitum, and not malum in se.[84] We have also seen that in certain cases the parties to an illegal contract are not regarded as being in pari delicto, and that the person who is the less guilty is allowed to recover what he has paid under the contract.[85] So, also, where a person has performed services under an illegal contract, and he is not in pari delicto with the other party, he may be allowed to recover what the services are worth. Where, however, an illegal contract has been performed, and the illegal object effected, neither party, if he knew of the illegality, can recover for the benefits conferred upon the other.[86]

Same—Part Performance of Unenforceable or Void Agreement

Where an agreement is not illegal, but merely void, or unenforceable, and one of the parties refuses to perform his promise after performance or part performance by the other, the law will create a promise to pay for the benefits received. If a man delivers goods, or conveys land, or renders services for another under a contract which is void or unenforceable, but not illegal, he may recover on the quantum valebat or quantum meruit.[87] Such is the case with contracts which are unenforceable because of noncompliance with the statute of frauds.[88]

A party, however, who has partly performed a contract which is merely unenforceable and not illegal, cannot, by the weight of authority, abandon it, and recover for the part performance, if the other party is willing to carry out the contract.[89]

[84] Ante, pp. 425, 431.

[85] Ante, pp. 428, 431.

[86] Roller v. Murray, 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202, Ann. Cas. 1913B, 1088. For criticism of rule, see Woodward, Quasi Cont. 214, and article by Professor J. H. Wigmore, 25 Am. Law Rev. 712. *See "Contracts," Dec. Dig. (Key-No.) § 138; Cent. Dig. §§ 681–700.*

[87] Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Patten v. Hicks, 43 Cal. 509; Rebman v. Water Co., 95 Cal. 390, 30 Pac. 564; Ellis v. Cory, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Smith v. Wooding, 20 Ala. 324; Little v. Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; Montague v. Garnett, 3 Bush (Ky.) 297; ante, p. 119. *See "Work and Labor," Dec. Dig. (Key-No.) § 10; Cent. Dig. § 25.*

[88] See cases above cited.

[89] Philbrook v. Belknap, 6 Vt. 383; Galway v. Shields, 66 Mo. 313, 27 Am. Rep. 351; Ketchum v. Evertson, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; Collier v. Coates, 17 Barb. (N. Y.) 473; Greton v. Smith, 33 N. Y. 245; Nelson v.

Same—On Rescission of Contract

As we have seen, if a person has obtained money from another under an agreement which the latter has the right to rescind on the ground of fraud, duress, or undue influence, or on the ground of want or failure of consideration, or want of capacity to contract, or because of a breach of his contract by the other operating as a discharge, he may, on rescinding the contract, recover the amount paid as money received for his use.[40] So, by the weight of authority, where a person, for like reasons, rescinds a contract which he has partly performed by the rendition of services, he may recover for the services on a promise created by law because of their receipt and the benefit conferred.[41]

The existence of the special contract in these cases which has been rescinded precludes the implication of any other contract in fact. The obligation, therefore, is necessarily imposed by law.

Shelby Manuf'g & Imp. Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116; McKinney v. Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; Sennett v. Shehan, 27 Minn. 328, 7 N. W. 266; Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484; Sims v. Hutchins, 8 Smedes & M. (Miss.) 331, 47 Am. Dec. 90; Abbott v. Inskip, 29 Ohio St. 59; Shaw v. Shaw, 6 Vt. 69; Plummer v. Bucknam, 55 Me. 105; Clark v. Terry, 25 Conn. 395; Hawley v. Moody, 24 Vt. 605; Richards v. Allen, 17 Me. 296; ante, p. 160. Contra, King v. Welcome, 5 Gray. (Mass.) 41 (but see Riley v. Williams, 123 Mass. 506); Koch v. Williams, 82 Wis. 186, 52 N. W. 257. *See "Work and Labor," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 29–33; "Contracts," Cent. Dig. §§ 1476–1478, 1500, 1506, 1508, 1554.*

[40] Ante, p. 630.

[41] Palanche v. Colburn, 8 Bing. 14; Ex parte Maclure, L. R. 5 Ch. App. 737; Seipel v. Insurance Co., 84 Pa. 47; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Medbury v. Watrous, 7 Hill (N. Y.) 110; Williams v. Bemis, 108 Mass. 91, 11 Am. Rep. 318; Brown v. Railway Co., 36 Minn. 236, 31 N. W. 941; Shane v. Smith, 37 Kan. 55, 14 Pac. 477; ante, p. 647. *See "Work and Labor," Dec. Dig. (Key-No.) § 14; Cent. Dig. §§ 29–33.*

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